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No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
v. *Petitioners,*

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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127 pp

QUESTION PRESENTED

Whether a lawsuit containing claims that a local administrative agency's decision violates federal law, but also containing state-law claims that are not reviewed de novo, is a "civil action" within the original jurisdiction of the federal district courts.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago, the Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr., and Cherryl Thomas.* The respondents are the International College of Surgeons, the United States Section of the International College of Surgeons, Robin Construction Corporation, 1500 Lake Shore Drive Building Corporation, and the North State, Astor, Lake Shore Drive Association.

* Two petitioners—Joseph F. Boyle, Jr. and Larry Parkman—were not named as defendants-appellees below, but were automatically made parties by virtue of Fed. R. App. P. 43(c).

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Petitioners, the City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr. and Cherryl Thomas, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-25a is reported at 91 F.3d 981 (7th Cir. 1996). The opinions of the district court, App., *infra*, at 26a-96a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A timely petition for rehearing was denied on November 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367 provides, in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

....

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1441(a) provides, in pertinent part:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending

STATEMENT

The International College of Surgeons and the United States Section of the International College of Surgeons (collectively "ICS") own two parcels of land on North Lake Shore Drive in the City of Chicago. App., *infra*, at 2a. In July 1988, the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission") made a preliminary determination that seven buildings in that area, including the two mansions on the properties at issue, satisfied the criteria for designation as a landmark district under the Chicago Landmarks Ordinance. *Id.* at 3a. On June 28, 1989, the Chicago City Council accepted this determination and passed an ordinance creating a landmark district that included these properties. *Ibid.*

In February 1989, after the Landmarks Commission's preliminary determination but before the City Council had acted, ICS executed a contract for the sale and redevelopment of the property, calling for the demolition of all but the facades of the mansions and the construction in their place of a forty-one story condominium building, contingent on ICS's ability to obtain all necessary permits and approvals. App., *infra*, at 3a. Robin Construction Corporation acquired the developer's interest later in 1989. *Ibid.* ICS applied for demolition permits, and on January 9, 1991, the Landmarks Commission denied its applications for permits. *Ibid.* On February 13, 1991, ICS filed a lawsuit in the Circuit Court of Cook County, Illinois, seeking judicial review of that decision, and the defendants re-

moved the case to the United States District Court for the Northern District of Illinois. *Ibid.* The district court denied ICS's motion to remand the case to state court, concluding that ICS's complaint had raised federal questions and accordingly was within the scope of federal removal jurisdiction under 28 U.S.C. § 1441. App., *infra*, at 94a-95a.

On February 8, 1991, ICS filed an application under the economic hardship exception in the Landmark Ordinance seeking the Landmarks Commission's approval for the issuance of demolition permits. App., *infra*, at 4a. The Landmarks Commission also denied this request, and ICS then filed a second action in state court again seeking judicial review. *Ibid.* The defendants removed this action as well to the district court. *Ibid.*¹

In the two consolidated actions challenging the determinations of the Landmarks Commission, the district court granted the defendants' motion for summary judgment, holding that the Landmarks Commission's refusal to approve issuance of the demolition permits was consistent with the United States Constitution, the Illinois Constitution, and the Landmarks Ordinance. App., *infra*, at 89a. ICS then appealed.

On appeal, the Seventh Circuit reversed and ordered the cases remanded to state court. The court of appeals

¹ ICS also sought approval of its redevelopment plan from the Chicago Plan Commission, as required under Chicago's Lakefront Protection Ordinance, but after a public hearing, the Plan Commission refused to approve the plan. App., *infra*, at 4a. ICS then sought an amendment to the Chicago Zoning Ordinance permitting the proposed development, but the Chicago City Council refused to approve the amendment. *Ibid.* ICS then filed a third suit, this time in federal district court, seeking review of these determinations under both federal and state law. *Ibid.* The district court stayed this third action pending its disposition of the two actions that had been removed from state court, *ibid.*, and later dismissed the case as moot, app., *infra*, at 92a-93a. That third case is not at issue in this petition.

began by noting that removal jurisdiction exists over any "civil action brought in a State court of which the district courts of the United States have original jurisdiction." App., *infra*, at 6a-7a (quoting 28 U.S.C. § 1441(a)). This inquiry, in turn, depends on whether "the action originally could have been brought in the district court." *Id.* at 7a. In this case, the district court had ruled that ICS's complaints were within federal question jurisdiction because they alleged that the Landmarks Commission's decision violated the United States Constitution. The court of appeals agreed that "a state judicial proceeding to conduct de novo review of a state's administrative decision is a 'civil action[] . . . of which the district court has original jurisdiction' within the meaning of 28 U.S.C. 1441(a)." *Id.* at 11a (brackets and ellipsis in original). The court concluded, however, relying primarily on *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), that there is no civil action when "the state administrative review scheme provides for deferential review of a state agency's decision." App., *infra*, at 11a. In such cases, deferential review "would require the district court to perform an appellate role," which was "a function that could [not] be described as a 'civil action' within its original jurisdiction" *Id.* at 14a.

The court of appeals then analyzed Illinois law to determine what type of review the state court would have given to ICS's claims. Generally, Illinois law requires courts to apply a "deferential standard of review" to administrative decisions. App., *infra*, at 18a-19a. Illinois law recognizes, however, that an action seeking review of an agency's decision can include an "attack on the facial validity of the statute," which "would be considered an original action that raised a federal question and was therefore subject to removal to the district court." *Id.* at 19a. Illinois law also recognizes that a plaintiff aggrieved by an administrative decision can attack a statute's con-

stitutionality as applied to its own case and that "[s]uch a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." *Id.* at 20a. Thus, such claims also "would allow removal to the federal court." *Ibid.* This case was a hybrid: ICS has brought "facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension, and claims based on state grounds that . . . must be adjudicated on the basis of the administrative record." *Ibid.* (footnote omitted). Accordingly, this case presented the question "whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible." *Ibid.*

On this issue, the court of appeals looked to its prior decision in *Francis J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), in which the court had refused to allow removal of a state-court complaint containing claims barred by the Eleventh Amendment as well as claims that were within federal jurisdiction. *Francis J.* had read Section 1441(a) as "'only authoriz[ing] the removal of actions that are within the original jurisdiction of the federal courts.'" App., *infra*, at 21a (emphasis in original) (quoting *Francis J.*, 19 F.3d at 340). Here, because ICS's state-law claims seeking judicial review of the administrative record were not within the district court's original jurisdiction, the court of appeals held that the case "cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of Section 1441(a)." App., *infra*, at 22a. And, according to the court, Section 1441(c) did not alter this result. Although that statute permits removal of otherwise non-removable claims when joined with claims within federal-question jurisdiction,

Section 1441(c) "presuppose[s] the existence of a 'civil action.'" *Ibid.*²

REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that the presence in a complaint of state-law claims over which a court would not exercise de novo review makes a lawsuit something other than a "civil action" and hence non-removable even if the suit also contains claims unquestionably within federal-question jurisdiction under 28 U.S.C. § 1331 because they allege that the agency's decision violated the United States Constitution. This issue merits plenary review by this Court. This issue has arisen in other circuits, which have resolved it inconsistently. This conflict is particularly intolerable on a jurisdictional issue, which creates enormous uncertainty about subject-matter jurisdiction over litigation in those circuits that do not follow the rule embraced below as well as in circuits that have not addressed the issue. In addition, this decision creates a substantial and unwarranted restriction on the scope of federal jurisdiction.

The court of appeals' holding rests on two fundamental errors of statutory construction. First, as the Eighth Circuit has concluded, administrative review actions are "civil actions" within the meaning of federal jurisdictional statutes even when they do not call for de novo review of an agency's decision. Indeed, federal district courts routinely hear suits challenging administrative action under the Administrative Procedure Act as part of their federal-question jurisdiction conferred by Section 1331, the coverage of which is also limited to "civil actions."

² Section 1441(c) provides: "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C. § 1441(c).

Second, the removal statute, 28 U.S.C. § 1441, contains no requirement that every claim in a removed action must be a "civil action" for removal to be proper. As the Sixth and Ninth Circuits have concluded, a state-court complaint is removable even if some of the claims in it may not be independently heard in federal court. That rule should control here. This lawsuit contained claims challenging the constitutionality of a decision by the Landmarks Commission that required no deferential or appellate-style review of the Commission's decision. Those claims were within the district court's original jurisdiction, as the court of appeals itself acknowledged. And this constitutional attack on an agency's decision did not become something other than a "civil action" simply because it was joined with state-law claims that were not within the district court's original jurisdiction. That is because ICS's state-law administrative review claims did not need to be a "civil action" themselves—they are instead removable as supplemental state-law claims under 28 U.S.C. § 1367.

These errors are particularly serious because when district courts apply the decision below (in circuits that follow the rule adopted here or in circuits where the question is open and a district court is persuaded by the decision below), appellate review will not be available given the restrictions of 28 U.S.C. § 1447(d), which prohibits review of an order remanding a case for lack of jurisdiction by appeal, mandamus, or otherwise. Unless the Court reviews this issue now, its ability to reach it later will be sharply circumscribed.

1. Relying primarily on *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), the panel held that actions seeking judicial review of administrative decisions are not removable "civil actions" when state law does not provide for de novo review. This result is

difficult to square with the ordinary meaning of the phrase "civil action." ICS's case was "civil" in character, and it was surely an "action" by which ICS sought judicial relief against an adverse and assertedly unlawful governmental decision. Indeed, the decision below is in square conflict with *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), in which the court reached precisely the opposite construction of Section 1441. Indeed, the Seventh Circuit expressly repudiated *Range Oil Supply* in its decision in this case, as did the Fourth Circuit in *Fairfax County*. See App., *infra*, at 15a-16a n.10; *Fairfax County*, 64 F.3d at 158.

In *Range Oil Supply*, Range appealed an adverse decision of a state railroad commission to state court, alleging that the record before the commission established that its decision was unlawful and unreasonable. See 248 F.2d at 478. The railroad removed the action to the district court because the parties were of diverse citizenship, and the district court upheld the commission's decision. See *ibid.* On appeal, the Eighth Circuit concluded that the action was removable as a "civil action" because once Range took the matter to state court "it in effect began a civil suit in which it sought to have the court hold that the order under review was unlawful and unreasonable." *Id.* at 479. And although the railroad claimed that this was really an appeal from the commission's decision, the court concluded that "[t]he phrase 'original jurisdiction' as used in Sec. 1441(a) . . . is and can only be a reference to Sec. 1332(a) and Sec. 1331 . . . both of which are declarations that the United States District Courts shall have original jurisdiction in the cases enumerated." *Ibid.* Range's case met the requirements for diversity jurisdiction, was accordingly within the district court's original jurisdiction, and thus "the court properly retained jurisdiction of the case." *Ibid.* This was also the view that Judge Widener took in dissent in *Fairfax County*. See 64 F.3d at 160-63. Accord *Minnesota v. Chicago & N.W. R. Co.*, 309 F. Supp. 56, 57-58 (D. Minn. 1970); *City of Owatonna v. Chicago, R.I. & P.R. Co.*, 298 F. Supp.

919, 921-22 (D. Minn. 1969); *Vann v. Jackson*, 165 F. Supp. 377, 380 (E.D.N.C. 1958); *Larkin v. Roseberry*, 54 F. Supp. 373, 374-75 (E.D. Ky. 1944); *In re Chicago, M., St. P. & P.R. Co.*, 50 F.2d 430, 433-34 (D. Minn. 1931).

For nearly 40 years, until the two 1995 decisions on which the panel relied, *Range Oil Supply* was treated as hornbook law. Indeed, the two leading commentators cite *Range Oil Supply* for the proposition that state-law claims seeking judicial review of administrative decisions are removable "civil actions" despite the appellate nature of the review to be provided. See 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157[4.-3] at 73-74 (2d ed. 1996); 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721 at 206-07 (1985).³ Thus, the decision below, like

³ Although the panel cited some other decisions for its holding that "district courts are without jurisdiction to review on appeal the findings of state agencies" (App., *infra*, at 15a-16a n.10), these cases all are quite distinguishable. *Labiche v. Louisiana Patients' Compensation Fund Oversight Board*, 69 F.3d 21 (5th Cir. 1995) (per curiam), did not involve removal of a case containing federal attacks on an agency's decision; the plaintiff there had attempted to obtain federal review of a state agency's decision without raising any claim that fell within federal jurisdiction. See *id.* at 22. In *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), the plaintiff had never sought review of the agency's decision under state law, and the court held that FSK's federal civil rights action was "not an appropriate vehicle to consider whether a state or local administrative determination was arbitrary or capricious." *Id.* at 11. In *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), the court merely held that the federal Administrative Procedure Act did not authorize federal judicial review of what was in reality the decision of a state agency. See *id.* at 413-14. In *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979), the court considered and rejected the plaintiff's constitutional attack on the administrative proceedings that led to her demotion, and then held her state-law claims were not properly pendent to her federal claim. See *id.* at 1193-94. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), held that a proceeding before the labor board was before a "court"

Fairfax County and *Armistead*, have upset well-established principles of federal jurisdiction and created a square conflict in the circuits.

No decision of this Court helps to resolve this conflict. Although the Seventh Circuit discussed *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), it acknowledged that the holdings in both cases are inapplicable here, and that this Court "has not had the opportunity to decide a case in which a party had attempted to remove a state court proceeding when the state administrative review scheme provides for deferential review of a state agency's decision." App., *infra*, at 11a.

In *Stude*, the Court held that the railroad could not remove an appeal it had taken from an administrative order condemning certain properties because the railroad was not a state-court "defendant" within the meaning of the removal statute. See 346 U.S. at 578-80. The Court also held that the railroad could not file an original action in the district court contesting the administrative decision since the railroad had complained only about the size of the condemnation award and a district court has no authority to hear an appeal on "the question of damages and try it apart from the substantive right from which the claim of damages arose." *Id.* at 582. If anything, dicta

for removal purposes, and hence the proceeding was properly removed to federal court. See *id.* at 41-45. In *Trapp v. Goetz*, 373 F.2d 380 (10th Cir. 1966), the court held that Trapp could not file an action seeking a pension because the state pension board had not yet decided his case. See *id.* at 382-83. And although both *Crivello v. Board of Adjustment*, 183 F. Supp. 826 (D.N.J. 1960), and *Collins v. Public Service Commission*, 129 F. Supp. 722 (W.D. Mo. 1955), contain dicta consistent with the decision below, both hold that the state suits at issue raised no federal question and hence were not removable for that reason. See 183 F. Supp. at 828; 129 F. Supp. at 725-26. In his dissent in *Fairfax County*, Judge Widener distinguished most of these cases on the same grounds that we offer here. See 64 F.3d at 162 n.4.

in *Stude* supports the holding in *Range Oil Supply*; the Court in *Stude* wrote that once a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." *Id.* at 578-79. This observation appears to be in no way dependent on the scope of review to be exercised by the state court. In *Horton*, the Court held that an action to set aside a worker's compensation award was removable, although in that case state law permitted trial de novo. See 367 U.S. at 354-55. Thus, as the court below acknowledged, neither decision controls here.

The most powerful reason, however, to conclude that an action seeking a form of deferential review of an administrative decision is a civil action within the district court's original jurisdiction is that this is the settled rule in federal administrative law. The Administrative Procedure Act ("APA") grants those aggrieved by agency action a right of judicial review. See 5 U.S.C. §§ 701-06 (1994). Judicial review of agency action under the APA ordinarily must "go first to the district court rather than to a court of appeals." *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994); accord, e.g., *Public Citizen v. FTC*, 829 F.2d 149 (D.C. Cir. 1987) (per curiam); *City of Norwood v. Harris*, 683 F.2d 150 (6th Cir. 1982) (per curiam). See also *In re School Board of Broward County*, 475 F.2d 1117, 1119 (5th Cir. 1973) (APA authorizes "an original action in a court of competent jurisdiction" and not the filing of an original action for "appellate court review"). This is the case even though judicial review under the APA is also "deferential," as the court of appeals used that term here. Indeed, it has been long settled that the APA ordinarily does not permit trial de novo in the district court, see, e.g., *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam), and that it requires courts to grant substantial deference to the decision of the agency, see, e.g., *Thomas*

Jefferson University v. Shalala, 114 S. Ct. 2381, 2386-87 (1994). Nevertheless, this Court has held that the APA is not itself a grant of jurisdiction to the district courts, and that district courts have original jurisdiction under 28 U.S.C. § 1331 over APA actions seeking judicial review of agency decisions. See *Califano v. Sanders*, 430 U.S. 99, 104-08 (1977). See also *McCartin v. Norton*, 674 F.2d 1317, 1320 (9th Cir. 1982) ("[w]hile the Administrative Procedure Act does not confer jurisdiction on the federal courts to review agency action, it is now clear that 28 U.S.C. § 1331(a) does"). Section 1331, of course, confers "original jurisdiction" over "civil actions." Thus APA actions plainly qualify as "civil actions" within "original jurisdiction" even though they do not involve plenary review of an agency's decision. Moreover, the Rules of Civil Procedure make clear that all actions—including APA review actions—are "civil actions." See Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"). The Seventh Circuit's conclusion here that a claim for deferential judicial review of an administrative decision is not a "civil action" properly within the district court's original jurisdiction is thus not only inconsistent with *Califano v. Sanders* and settled principles of federal jurisdictional practice, but, if correct, would mean that a vast quantity of federal administrative litigation is jurisdictionally defective.

Nor can the holding below be reconciled with the availability of original jurisdiction in the district court over APA actions on the basis that principles of federalism require the phrase "civil action" to be construed differently when the decision of a state or local agency is to be reviewed than when the decision of a federal agency is to be reviewed. Federalism has never been understood to erect an absolute bar to a proceeding in federal court to a challenge to the decision of a state or local agency, even on state-law grounds. Rather, as the Court reiterated only last Term, the rule is that a federal court may hear such a case unless "it presents 'difficult questions of state

law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1726 (1996) (second internal quotations omitted) (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). That is not, of course, the test adopted by the Seventh Circuit here.

Moreover, because the holding below does not prevent plaintiffs from seeking de novo review of the decisions of state and local agencies in a federal civil rights action in a district court when the plaintiff wishes a federal forum, it is particularly anomalous when viewed through the lens of federalism. Under the decision below, a plaintiff such as ICS wishing a federal forum to litigate the federal questions that arise from an administrative decision could obtain it by filing an action within federal-question jurisdiction under Section 1331. Given that, it is surely a strange brand of federalism that would limit only the ability of state and local agencies to obtain a federal forum when that is where they choose to defend their administrative actions, while providing those who wish to undermine those decisions with greater ability to select a federal forum. And it is even a stranger brand of federalism that permits federal courts to review the decisions of state and local agencies de novo—as in *Horton*—but forbids federal courts from affording deference to the decisions of those state and local agencies. If federal district courts may review the decisions of federal agencies deferentially, as they plainly can, then federalism provides no reason to bar similar review of the decisions of state and local agencies.

2. Even if the court of appeals were correct that a claim seeking something other than de novo review of a

state administrative decision is not a "civil action," that should not defeat removal when that is not the only claim made in a state-court complaint. As the court below recognized, ICS also brought facial and as-applied constitutional challenges to the decision of the Landmarks Commission that required de novo review. App., *infra*, at 20a. These claims, if brought alone, would plainly qualify as a "civil action," as the court of appeals acknowledged. That court recognized that ICS's complaints included federal-question claims that, "if brought alone, would be removable to federal court" *Ibid.* In concluding that federal removal jurisdiction over such claims is defeated when the plaintiff joins these claims with other state-law claims that do not independently qualify as a "civil action," the court below erred.

Nothing in the language of Section 1441 supports the result below. Section 1441(a) makes any "civil action" removable, and Section 1441(c) adds that removal remains proper even when a removable claim "is joined with one or more otherwise non-removable claims or causes of action" Jurisdiction over "claims" that are not themselves removable parts of a "civil action" is in turn conferred by the supplemental jurisdiction statute, which provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other *claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (emphasis added). Thus the district court can hear a "claim" under its supplemental jurisdiction even if it is not itself a "civil action."

Here, as the court of appeals acknowledged, ICS's requests for review of the Landmarks Commission's decision under Illinois administrative law are plainly "claims," See, e.g., App., *infra*, at 4a, 20a, 23a (referring to ICS's administrative review claims as "claims"). Thus they fall

within federal supplemental jurisdiction.⁴ Section 1367(a) also contains no exception for claims seeking deferential review, nor an exception for cases within removal jurisdiction. To the contrary, when, as here, a suit combines claims that fall within federal courts' federal question jurisdiction with claims that fall within federal courts' supplemental jurisdiction under Section 1367, the entire suit is properly removable under Section 1441(a). See *Zuniga v. Blue Cross & Blue Shield of Michigan*, 52 F.3d 1395, 1399 (6th Cir. 1995); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785-87 (3d Cir. 1995); *Booty v. Shoney's, Inc.*, 872 F. Supp. 1524, 1528 (E.D. La. 1995); see also 1A James W. Moore, *supra*, ¶ 0.160[6] at 246 ("If a federal question claim is pleaded, under § 1367(a), the district courts would have original supplemental jurisdiction over any state law claims that the plaintiff may have Therefore, if an action including both state and federal claims is brought originally in a state court, the district courts would also have supplemental removal jurisdiction under § 1441(a)."). Cf. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350-51 (1988) ("pendent" state law claims properly removed under Section 1441(a) prior to enactment of Section 1367). The court of appeals' contrary decision is inconsistent with the role that these other courts have recognized for supplemental jurisdiction in removal cases, as well as with the plain import of Sections 1331 and 1367, which grant district courts jurisdiction over both "civil actions" and related "claims." Indeed Congress amended Section 1441(c) in 1990 to ensure that district courts could exercise removal jurisdiction over all claims within both their federal-question and supplemental jurisdiction. See *Borough of West Mifflin*, 45 F.3d at 785.

⁴ ICS has never contended that its state-law claims are not sufficiently connected to the federal claims to fall within supplemental jurisdiction. Nor could it. ICS's state law and federal claims attack the Landmarks Commission's refusal to approve a demolition permit on essentially the same grounds, as the district court's opinion makes clear. See App., *infra*, at 45a-89a.

Because Congress specifically addressed, in Section 1367, the question whether federal courts should hear "claims" not otherwise within federal jurisdiction when joined with claims within federal-question jurisdiction, and did not exempt claims subject to deferential review, the court of appeals should not have refused the exercise of federal jurisdiction because of its belief that district courts should hear only claims for de novo review. "The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *New Orleans Public Service, Inc.*, 491 U.S. at 358 (quoting *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893)). This is because of "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction. . . ." *Id.* at 359.⁵

The applicable statutory framework here also distinguishes this case from *Francis J. v. Wright*, upon which the court of appeals heavily relied. *Francis J.* involved a suit that was removed to federal court but that included claims that were barred by the Eleventh Amendment. The Seventh Circuit held that removal of such cases was improper, reasoning that

⁵ This is not to say that federal courts must necessarily exercise their jurisdiction over supplemental claims such as ICS's. Section 1367(c) identifies a variety of circumstances in which a federal court can decline to exercise jurisdiction over supplemental claims, including the presence of "novel or complex issue[s] of State law" or where state law "substantially predominates over the claim or claims over which the district court has original jurisdiction." But ICS never sought a Section 1367(c) remand in the district court, and even if the court of appeals had been inclined to forgive this waiver, that would not support its jurisdictional holding. Section 1367(c) simply authorizes a discretionary remand of state-law claims; it does not negate the existence of jurisdiction over the federal claims.

if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court.

19 F.3d at 341. This reasoning does not reach this case. Here, as we explain above, there was jurisdiction over all of ICS's claims—either original jurisdiction under Section 1331 or supplemental jurisdiction under Section 1367.

Francis J. is in any event a slender reed on which to premise a decision to foreclose federal jurisdiction here—indeed, the soundness of *Francis J.* independently merits plenary review. While one circuit has reached the same result, see *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985); accord *Flores v. Long*, 926 F. Supp. 166, 168-70 (D.N.M. 1995), two other circuits have rejected this approach, reasoning that the Eleventh Amendment bars federal jurisdiction over only particular claims and that a jurisdictional bar to hearing some claims should lead only to remand of those claims but not defeat the court's ability to hear removed claims within its federal jurisdiction. See *Kruse v. Hawai'i*, 68 F.3d 331, 334-35 (9th Cir. 1995); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 336-39 (6th Cir. 1990). Accord *Brewer v. Purvis*, 816 F. Supp. 1560, 1570-71 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.), *cert. denied*, 115 S. Ct. 1965 (1995), *Texas Hospital Association v. National Heritage Insurance Co.*, 802 F. Supp. 1507, 1512-16 (W.D. Tex. 1992).

The decision below not only is in conflict with the law in other circuits, but it creates a serious problem in removal jurisprudence. Under the Seventh Circuit's ruling, a state court plaintiff could defeat removal by casting its constitutional challenge as a state-law administrative review count whenever the plaintiff is content to rely on the administrative record. Yet it is a settled rule of removal

jurisprudence that a state-court plaintiff should not be able to defeat the right of removal through "artful pleading." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). The holding below, which permits just that, should accordingly be reviewed by this Court.

3. Even without the conflicts with the decisions of other circuits and errors in the holdings below, the Seventh Circuit's decision about the scope of federal jurisdiction itself merits plenary review—for one thing, it means that a state-court plaintiff can defeat the right to removal of federal constitutional claims by including at least one claim that seeks deferential review; for another, it means that even a federal plaintiff cannot bring all claims arising from a single administrative decision in a single action in a federal forum, since the presence of a state claim seeking deferential review means that the entire case is not a "civil action" and thus not within Section 1331's federal-question jurisdiction.

Administrative adjudication is becoming an ever-more prevalent method of enforcing state and local laws. With increasing frequency, the backlog in state and local court systems is being addressed by removing cases from the state judiciary and placing them in state or local administrative agencies. The holding below—eliminating federal-question jurisdiction whenever the complaint presents at least one claim seeking something other than *de novo* review of an administrative decision—will radically circumscribe federal jurisdiction over cases seeking judicial review of the decisions of state and local agencies. This, in turn, creates a serious gap in the availability of federal jurisdiction in which important federal questions are raised or in which a nonresident of the forum state who is aggrieved by an administrative decision seeks a federal forum.

Moreover, the need for this Court's intervention is especially urgent because of the limits on review of an order

of a district court remanding a case to state court. There are now three circuits in which district courts will be bound to remand to state court any case seeking other than de novo review of an agency's decision, and orders of remand for lack of jurisdiction are not ordinarily reviewable on appeal or otherwise. See 28 U.S.C., § 1447 (d). "If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). See also *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 497 (1995). Thus, "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court." *Thermtron Products*, 423 U.S. at 351. Accordingly, for any case in these three circuits, review by this Court will no longer be available. Nor will review be available from any decision of a district court in any other circuit to remand a case under the rationale employed by the Seventh Circuit here. Conversely, in circuits that follow *Range Oil Supply* or *Kruse* and *Henry*, a substantial quantity of federal litigation is now underway that will prove jurisdictionally defective should this Court ultimately agree with the holding below. The need for review of the question presented here is therefore unusually clear, as it often will be whenever the scope of federal jurisdiction over a large class of cases has been cast into doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-1293, 95-1315

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its commissioners, REUBEN L. HEDLUND, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
[Nos. 91 C 1587, 91 C 5564 &] 91 C 7849—
John F. Grady, *Judge*

ARGUED NOVEMBER 6, 1995—DECIDED AUGUST 1, 1996

Before BAUER and RIPPLE, *Circuit Judges*, and SKINNER, *District Judge*.*

* The Honorable Walter Jay Skinner of the United States District Court for the District of Massachusetts is sitting by designation.

RIPPLE, Circuit Judge. The International College of Surgeons and the United States Section of the International College of Surgeons (collectively the "College") applied to the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission") for the demolition permits required to redevelop certain landmarked property on Lake Shore Drive in Chicago. The Landmarks Commission denied this application and the College's subsequent request for an economic hardship exemption. The College, alleging various federal and state constitutional grounds, challenged the Commission's decisions in separate complaints for administrative review filed in the Circuit Court of Cook County. The City of Chicago removed the complaints to federal court. The district court later granted the City's motion to dismiss certain of the College's challenges and entered summary judgment against the College on the remaining claims. For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand with instructions that the case be remanded to the Circuit Court of Cook County.¹

I

BACKGROUND

The College owns two parcels of land on Lake Shore Drive in Chicago. The first parcel, located at 1516 Lake Shore Drive, is improved with a four-story mansion known as the Edward T. Blair House. The second parcel, at 1524 Lake Shore Drive, is improved with a three-story mansion known as the Eleanor Robinson Countiss House. The College uses the buildings, which are connected by a bridge that enables their use as one structure, to house administrative offices and a museum.

¹ For the disposition of the federal declaratory action that had been consolidated with the complaints for administrative review, see *infra* note 15.

In July 1988, the Landmarks Commission made a preliminary determination that seven buildings on Lake Shore Drive, including the properties at issue here, met the criteria for landmark designation set out in the Chicago Landmarks Ordinance.² The Landmarks Commission voted to recommend to the City Council that the seven buildings receive landmark designation and, on June 28, 1989, the Chicago City Council passed the "Seven Houses on Lake Shore Drive District Ordinance" (the "Designation Ordinance") designating the landmark district.

In February 1989, before the enactment of the Designation Ordinance, the College executed a contract for the sale and redevelopment of the property. The \$17 million contract, which provided for the demolition of all but the facades of the Blair and Countiss residences and the construction of a forty-one-story condominium building behind the facades was contingent on the College's ability to obtain all the permits and approvals necessary for redevelopment of the property. Robin Construction Corporation, a developer of high-rise residential developments and one of the plaintiffs here, acquired the contract purchaser's interest later in 1989.

When the College applied for permission to demolish the buildings at 1516 and 1524 Lake Shore Drive, its applications were forwarded to the Landmarks Commission. The Commission rendered its final decision denying the College's permit requests on January 9, 1991. The College then filed its first complaint in the Circuit Court of Cook County (No. 91 CH 1361); it sought judicial review of the administrative decision to deny the permits. The defendants removed this complaint to the United States District Court for the Northern District of Illinois, where it was docketed as number 91 C 1587.

² The Chicago Landmarks Ordinance creates the Commission and establishes the procedures for designating properties as Chicago Landmarks. See Municipal Code of Chicago ("MCC") §§ 2-120-580 to 2-120-920.

Pursuant to section 21-86 of the Landmarks Ordinance, the College also filed an application seeking an economic hardship exception to the Landmarks Commission's denial of the demolition permits. The Commission concluded that its denial of the demolition permits had not resulted in "the loss of all reasonable and beneficial use of or return from the property"—the standard that appears in the Landmark Ordinance—and denied the College's application. The College then filed its second complaint in the Circuit Court of Cook County (No. 91 CH 7289) seeking judicial review of the administrative decision to deny the economic hardship exception. Again, the defendants removed the action to federal district court, where it was docketed separately as number 91 C 5564.

Because the property also is governed by the Lake Michigan and Chicago Lakefront Protection Ordinance, the College was required to obtain approval for its proposed development under that ordinance as well. The Chicago City Council rejected the College's application for permits under the Lakefront Protection Ordinance, and the College filed a "Complaint for Declaratory Judgment and Other Relief" in the district court, where it was docketed as number 91 C 7849.

The district court consolidated the three cases and stayed case 91 C 7849—the declaratory judgment action—pending disposition of the other cases. In an order dated January 10, 1992, the court granted in part and denied in part the City's motion to dismiss cases 91 C 1587 and 91 C 5564—the complaints for administrative review. The College then filed an amended "Consolidated Complaint for Administrative Review" in the two cases again alleging federal and state law claims. On December 30, 1994, the district court entered summary judgment in favor of the City on all of the plaintiff's claims; it thus affirmed the Landmarks Commission's decision denying the College's application for demolition permits and denying its application for an economic hardship exception.

Having reached this conclusion, the court dismissed case 91 C 7849 with prejudice as moot and with leave to reinstate if the court's judgments in cases 91 C 1587 and 91 C 5564 were vacated, reversed or remanded on appeal. The College filed a notice of appeal in all three cases.

II

DISCUSSION

Before proceeding to the issues raised by the parties, we must determine whether the district court had subject matter jurisdiction over the claims raised in the College's complaint. The parties did not address the issue in their initial presentations to this court;³ subject matter jurisdiction, however, cannot be waived. Courts have a duty to resolve apparent jurisdictional problems *sua sponte*.⁴

A.

The College commenced the judicial proceedings in this case in the Circuit Court of Cook County. The College

³ At oral argument, we invited counsel to submit letters commenting on the jurisdictional issues raised by the Fourth Circuit in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co., Inc.*, 64 F.3d 155 (4th Cir. 1995). The parties' submissions have been made part of the record on appeal.

⁴ See Fed. R. Civ. P. 12(h) (8); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 896-97 (1991) (Scalia, J., concurring) (discussing the "nonwaivability" of the lack of subject-matter jurisdiction); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) ("Here it was the duty of the court to see that they had jurisdiction, for the consent of the parties could not give it."); *Commercial Nat'l Bank of Chicago v. Demos*, 18 F.3d 485, 487 (7th Cir. 1994) ("That the parties have not contested, nor the district court considered jurisdiction does not impede our inquiry. . . . [W]e must consider the issue *sua sponte* when it appears from the record that jurisdiction is lacking."); *United Steelworkers of America v. Libby, McNeil & Libby, Inc.*, 895 F.2d 421, 423 (7th Cir. 1990) ("Every federal appellate court has a special obligation to satisfy itself of the jurisdiction of the lower federal courts in a case under review.") (citations omitted).

sought, by way of its "Complaint for Administrative Review," judicial review of the Landmarks Commission's decision to deny its application for demolition permits. The complaint was filed pursuant to the Illinois Administrative Review Act ("IARA"), see 735 ILCS 5/3-103 *et seq.*, because the Landmarks Ordinance makes the final decision of the Commission approving or disapproving an application for a permit a "final administrative decision" appealable under the Act. See MCC § 2-120-800.⁵ The College filed a second "Complaint for Administrative Review" after the Commission denied its application for an economic hardship exception. See MCC § 2-120-860.⁶ The defendants sought the removal of each of these complaints to the United States District Court for the Northern District of Illinois.

Removal of "civil actions" from state court to federal court is authorized by 28 U.S.C. § 1441. The operative provision, section 1441(a), provides in relevant part:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court

⁵ Section 2-120-800 provides:

Final Commission Decision. The written decision of the Commission approving or disapproving an application for a permit . . . shall be on the date it issues a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Ill. Rev. Stat. Chapter 110, Sec. 3-101 *et seq.* (1985).

MCC § 2-120-800.

⁶ Section 2-120-860 provides:

Appeal from Commission Decision. The determination by the Commission . . . approving or disapproving an application for an economic hardship exception shall, on the date it issues, be a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Ill. Rev. Stat. Chapter 110, Sec. 3-101, *et seq.* (1985).

MCC § 2-120-860.

of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Under section 1441(a), therefore, the removal jurisdiction of the district court is tied to the original jurisdiction of the federal courts; removal is proper only if the action originally could have been brought in the district court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1998 (1995); *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994). Noting the presence of federal claims, the district court concluded that it had original jurisdiction over the College's complaints under the federal question statute, 28 U.S.C. § 1331. That section confers "original jurisdiction" on the district courts with respect to "civil actions . . . arising under the Constitution, laws, or treaties of the United States." *Id.*

Whether a state action was properly removed to federal court is a question of federal jurisdiction and, accordingly, subject to de novo review. *Seinfeld*, 39 F.3d at 763 (citing *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)). The specific question we must confront is whether the College's "Complaint for Administrative Review," filed under the Illinois Administrative Review Act, is a "civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).

B.

We begin our analysis with the Supreme Court's decision in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954). In *Stude*, the Iowa State Commerce

Commission had authorized a railroad to acquire the land necessary to improve its line of railway in a certain Iowa county. A state agency assessed condemnation damages against the railroad and, in order to obtain relief from this assessment, the railroad pursued two different avenues of relief. First, the railroad filed a complaint in federal district court. Invoking that court's diversity jurisdiction, the complaint asked the district court to review the agency's damage assessment. The district court granted the landowner's motion to dismiss the complaint, and the Supreme Court of the United States eventually affirmed that dismissal. The Court held that the district court was without jurisdiction to conduct a review of the state agency's ruling because "[t]he United States District Court for the Southern District of Iowa does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Id.* at 581. Noting that "a State legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction," the Court held that neither Congress nor the Federal Rules of Civil Procedure provided for such an appeal to the federal courts. *Id.* (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943)).⁷

⁷ The Supreme Court had also confronted the issue of federal court review of state administrative decisions in *Burford*. There, the Sun Oil Company had invoked the diversity jurisdiction of the district court to attack the validity of an order of the Texas Railroad Commission granting Burford a permit to drill four oil wells on a certain plot of land. Sun Oil further contended that the Railroad Commission's order denied it due process of law. Justice Black, in remarks prefatory to the Court's discussion of abstention by the federal courts, wrote:

There is some argument that the action is an "appeal" from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple pro-

As a second avenue of relief, the railroad appealed the state agency's assessment of condemnation damages to the state court using the procedure established by Iowa for administrative appeals. Under this procedure, the party aggrieved in the state agency may appeal to state court, and the case is "tried [by the state court] as in an action by ordinary proceedings." *Id.* at 576 (quoting Iowa Code § 472.21 (1950)). The railroad filed a notice of appeal seeking this de novo trial in state court, and the case was docketed, in accordance with the Iowa Code, with the landowner as plaintiff and the railroad as defendant. The railroad then attempted to remove the litigation to federal court. The district court denied the landowner's motion to remand the case to state court; the Court of Appeals reversed, however, and ordered this second case remanded to the state court. The Supreme Court affirmed this decision of the Court of Appeals on the ground that, for purposes of 28 U.S.C. § 1441(a), the railroad is the plaintiff and therefore cannot remove. However, addressing the nature of the state proceeding, the Supreme Court wrote:

The proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before those exercising judicial functions for the purpose of reviewing the question of damages. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court.

Id. at 578-79. Notably, the Court did not suggest that all agency action becomes a "civil action" upon its arrival for review in state court. Rather, the Court found the

ceeding in equity to enjoin the enforcement of the Commission's order.

Burford, 319 U.S. at 317 (footnotes omitted).

nature of the state judicial proceeding at issue in *Stude* to be significant. The case removed from state court to the district court was a de novo proceeding "tried [by the state court] as an action by ordinary proceedings." *Id.* at 576 (quoting Iowa Code § 472.21 (1950)).

This focus on the character of the state judicial action to determine whether or not it is a "civil action . . . of which the district court has original jurisdiction" finds further support in the Supreme Court's decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). In *Horton*, the Liberty Mutual Insurance Company contested a workman's compensation award granted to an employee by the Texas Industrial Accident Board. Texas law provided for such challenges to be made in a trial de novo, and Liberty Mutual, invoking the diversity jurisdiction of the federal district courts, filed its challenge in federal court. The Supreme Court upheld the district court's exercise of jurisdiction. Noting that the Texas Supreme Court had characterized these actions as "suits" and not "appeals," the Court wrote:

It is true that as conditions precedent to filing a suit a claim must have been filed with the Board and the Board must have made a final ruling and decision. But the trial in court is not an appellate proceeding. It is a trial de novo wholly without reference to what may have been decided by the Board.

Horton, 367 U.S. at 355.⁸ Accordingly, the Supreme Court concluded, the district court had jurisdiction over the insurance company's action. *Id.*

⁸ In a footnote, the Supreme Court noted that, under the decisions of the Texas Supreme Court, the administrative award becomes vacated and unenforceable once the state court acquired jurisdiction of the cause and the parties. "This makes it all the more clear that the matter in controversy between the parties to the suit is not merely whether the award will be set aside since the suit automatically sets it aside for determination of liability de novo." *Horton*, 367 U.S. at 355 n.15.

In *Stude* and *Horton*, therefore, the Supreme Court held that the district court properly exercised removal jurisdiction over state court actions that review de novo the earlier decision of a state administrative agency. In each case, the Court emphasized that the state court action subject to removal was a de novo suit in the state court; neither action required review of the agencies' findings or determinations. Because state judicial proceedings of this sort are conducted "wholly without reference to what may have been decided by the [state agency]," *id.* at 354-55, these actions cannot be characterized as "appeals" of an agency's decision; rather, such actions are "suits" like any other civil action over which the state court exercises original jurisdiction. The teaching of *Stude* and *Horton*, therefore, is that a state judicial proceeding to conduct de novo review of a state administrative decision is a "civil action[] . . . of which the district court has original jurisdiction" within the meaning of 28 U.S.C. § 1441(a).

The Supreme Court has not had the opportunity to decide a case in which a party had attempted to remove a state court proceeding when the state administrative review scheme provides for deferential review of a state agency's decision. However, our colleagues in other circuits have held that the district courts do not have jurisdiction to entertain such actions. The Fourth Circuit, in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), examined the question of removability in the context of a Virginia statute allowing for judicial review of state administrative decisions involving public contract disputes. *See* Va. Code Ann. § 11-71. The case arose out of a dispute between Fairfax County and the W.M. Schlosser Company, a contractor that had contracted to build a housing project for the county. Alleging that the county had not paid it in full, the contractor brought a state administrative claim against the county. The Fairfax County Executive, to whom the claim had been brought under a Virginia admin-

istrative review scheme, determined that the county had breached the parties' contract and ordered it to pay the deficiency. The county appealed to a Virginia circuit court under Virginia Code § 11-71, and the contractor, invoking the diversity jurisdiction of the district courts, removed the county's appeal to the district court for the Eastern District of Virginia. The Fourth Circuit held that the district court did not have jurisdiction to review the County Executive's decision. After reviewing the Supreme Court's holdings in *Stude* and *Horton*, the Fourth Circuit focused its analysis on the scope of the "judicial review" afforded by the Virginia administrative review statute in question. In this review,

the findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary and capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

Id. at 158 (quoting Va. Code Ann. § 11-71). Noting the deferential standard of review employed by the district court in reviewing the administrative decision, the Fourth Circuit summarized its holding:

Because the district court is a court of original jurisdiction, not an appellate tribunal, and, thus, is without jurisdiction to review on appeal action taken administratively or judicially in a state proceeding, it was without jurisdiction to conduct such a review of the County Executive's finding.

Id. Accordingly, the Fourth Circuit, following *Stude's* holding that only "civil actions" may be removed to the district court, ordered the case remanded to the Virginia circuit court.

Our colleagues in the First Circuit reached a similar conclusion in *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), which involved a defendant's

attempt to remove an action filed in state court to enforce an award issued by Maine's Workers' Compensation Commission. Removal of the case is "doubly barred," the First Circuit explained, because of the explicit statutory bar of 28 U.S.C. § 1445(c) and because the "supplementary superior court proceeding" to enforce the Commission's award does not qualify independently as a "civil action" removable under 28 U.S.C. § 1441(a). *Id.* at 46 (citing, *inter alia*, *Federal Savings & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969)). Judge Selya, writing for the court, elaborated on the latter proposition:

[T]he limited supplementary and appellate authority exercised by Maine courts over Commission proceedings finds no analogue in federal diversity jurisdiction. As courts of original jurisdiction, federal district courts sitting in diversity jurisdiction do not have appellate power, nor the right to exercise supplementary equitable control over original proceedings in the state's administrative tribunals.

Id. at 47.* Accordingly, the First Circuit ordered the cause remanded to state court.

* The reasoning employed by the First Circuit in *Armistead* is similar to that found in federal workmen's compensation cases decided before the enactment of 28 U.S.C. § 1445(c). These cases took the view that, once the state administrative process had come to an end, the question of whether a suit challenging an award may be brought in the district court depends upon the nature of the review provided by the state statute:

For example, where a right of trial de novo is provided in a state court of general jurisdiction, the de novo trial constitutes an original civil action; where only a right of an appellate, quasi-administrative review is provided in a state court, this is not a civil action within the cognizance of the original jurisdiction of the federal court.

1A James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.167[6] & n.15 (Supp. 1994) (collecting cases); e.g., *Decker v. Spicer Mfg. Div. of Dana Corp.*, 101 F. Supp. 207 (N.D. Ohio 1951); see also 1A James Wm. Moore et al., 0.157[4-3] & nn.6-7 ("A statutory

We agree with our colleagues in the First and Fourth circuits that, in determining whether a state action seeking judicial review of a state administrative agency's decision is removable, the focus must be upon the character of the state proceeding and upon the nature of the review conducted by the state court. If the state administrative review process provides for a trial de novo, removal of the action to federal court does not require the district court to perform an appellate function that is inconsistent with the character of a court of original jurisdiction. Under those circumstances, the state proceeding can be termed a "civil action." If, however, the state administrative review process requires the state court to proceed on the basis of a more deferential review of the state agency's findings and determinations, removal of the action to federal court would require the district court to perform an appellate role with respect to the decision of the state administrative agency. The district court would not be performing a function that could be described as a "civil action" within its original jurisdiction and, accordingly, the requirement of 28 U.S.C. § 1441(a) would not be fulfilled. We turn, therefore, to an examination of how the Illinois courts review administrative actions of the type involved in this case. Our focus must be on the scope of judicial review that would have been exercised by the

proceeding in state court to review an administrative determination is a civil action, unless the review proceeding is such an integral part of the administrative process as to constitute a continuation of the administrative proceeding."); cf. *Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969) (noting that "[a] supplementary proceeding, which is substantially a continuation of a prior suit, is not removable"); *Collins v. Public Serv. Comm'n of Missouri*, 129 F. Supp. 722 (W.D. Mo. 1955) (ruling that statutory state court review of Public Service Commission's finding that proposed condemnation would be in the public interest is a continuation of the administrative proceedings and not a civil action brought in a state court of which the district courts have original jurisdiction). Our holding today implicates the same concerns articulated in this line of cases.

Cook County Circuit Court in this case had it not been removed.¹⁰

¹⁰ Although the precise procedural contexts have varied, we note that other courts have concluded that district courts are without jurisdiction to review on appeal the findings of state agencies. See *Labiche v. Louisiana Patients' Compensation Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We have reviewed [the statutes fixing the jurisdiction of the district courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4; *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear the Company's claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (holding that the district court was without jurisdiction to review the denial of a permit by a state agency); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the extent that the federal district court would treat a case removed from the [state court] as a review of an administrative decision by giving deference to the [agency's] determination, . . . this would place a federal court in an improper posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332."); cf. *Frisson v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) (noting that the district court should have declined pendent jurisdiction over a demoted school teacher's state law claim because "it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief"); *Crivello v. Board of Adjustment of the Borough of Middlesex*, 183 F. Supp. 826 (D. N.J. 1960) (noting, in the course of remanding a proceeding brought in lieu of a prerogative writ of certiorari to review decision of zoning board, that "the nature of the proceeding is necessarily determinative of its removability under Sections 1441 and 1442"); *Collins v. Public Serv. Comm'n. of the State of Missouri*, 129 F. Supp. 722 (W.D. Mo. 1955) (noting "doubts as to whether [a petition to review an order of state agency] constitutes a 'civil action'" and holding that such a proceeding is not "one 'of which the district courts of the United States have original jurisdiction' within the meaning of the removal act"). The only case expressing the opposite view is *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). There, the Eighth Circuit took the view that, once the aggrieved party

C.

1.

We begin our examination of Illinois practice with the Illinois Administrative Review Act. As a general proposition, the IARA provides the exclusive method by which an aggrieved party may obtain judicial review of decisions made by certain administrative agencies in Illinois. See 735 ILCS § 5/3-102. The IARA provides for judicial review of "final decision[s]" of those administrative agencies whose enabling legislation adopts, by express reference, the provision of the Act. *Id.*

The judicial function performed by an Illinois court when it is reviewing agency action under the Illinois Administrative Review Act, is substantially different from the function that it performs when acting as a court of original jurisdiction. In reviewing an administrative decision, the court exercises a statutory, and not a general appellate, jurisdiction. Therefore, its powers are limited to the functions enumerated in 735 ILCS § 5/3-111.²¹ See

has taken an appeal to the state court, the proceeding becomes a civil action which is removable to the district court so long as the "jurisdictional requisites" of diversity of citizenship and amount in controversy are met. *Id.* at 479. We are unpersuaded by this reasoning. As the Fourth Circuit noted in *W.M. Schlosser*, the Eighth Circuit "did not consider that the diversity statute vests only 'original' and not 'appellate' jurisdiction in the district courts." See 64 F.3d at 158. The *Range Oil* court equates "original jurisdiction" with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless.

²¹ Under 735 ILCS § 5/3-111, the circuit court has the power to stay an administrative decision; to order the agency to amend, complete, or file the record of the administrative proceeding; to substitute, dismiss, or realign parties; to affirm or reverse the agency's decision in whole or in part; to remand the decision with proper instructions; and to enter money judgments where appropriate. The Illinois courts have construed strictly section 3-111 and have limited the reviewing court to exercising the powers enumerated therein. *E.g.*, *Chestnut v. Lodge*, 210 N.E.2d 836, 841 (Ill. App. Ct. 1965), *rev'd on other grounds*, 216 N.E.2d 799 (Ill. 1966).

Adamek v. Civil Serv. Comm'n, 149 N.E.2d 466, 469 (Ill. App. Ct. 1958). 735 ILCS § 5/3-110 limits the scope of judicial review:

Scope of Review . . . The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support or opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct.

735 ILCS § 5/3-110. Nevertheless, the Illinois courts and, indeed, this court, have noted that an Illinois court reviewing agency action under the IARA has the authority to rule on constitutional issues. Indeed, the validity of the ordinance upon which the proceeding is based may be challenged in the judicial review proceedings. *Howard v. Lawton*, 175 N.E.2d 556 (Ill. 1961); *Murray v. Board of Review of Peoria Co.*, 604 N.E.2d 1040, 1043 (Ill. App. Ct. 1992); see also *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1976). "To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision." *Howard*, 175 N.E.2d at 557.

When the constitutional issue involves the fairness of the administrative proceedings or the application of constitutional principles to the facts of the case before the administrative tribunal, the court is bound by the record made at the administrative proceeding. *Reich*, 527 F.2d at 671. Therefore, allegations that the governing legislation has been applied in a discriminatory or arbitrary manner require the exhaustion of administrative remedies. *City of Chicago v. Piotrowski*, 576 N.E.2d 64, 67 (Ill. App. Ct. 1991). In such a circumstance, when the record

is insufficient to permit a ruling on the constitutional claim, the court may remand the matter to the agency for further evidence. *Reich*, 576 F.2d at 671.

By contrast, facial attacks on the constitutionality of a statute or ordinance are not dependent on the factual record developed at the administrative hearing. Therefore, if not brought in the administrative proceeding, they may be brought without the exhaustion of administrative remedies.¹²

It is clear, then, that, as a general rule, the scope of judicial review accorded by IARA is akin to the deferen-

¹² The Illinois Supreme Court made this distinction succinctly in *Bank of Lyons v. County of Cook*, 150 N.E.2d 97, 98 (Ill. 1958):

Where the alleged constitutional infirmity is to be found in its terms, prior application for administrative relief is unnecessary. On the other hand, where it is alleged that a statute valid upon its face is applied in a discriminatory or arbitrary manner, the rule generally prevails that recourse must be had in the first instance to the appropriate administrative board. . . . In such cases the validity or invalidity depends almost wholly upon a determination of factual matters in which the specialized agency is thought to be more proficient.

The earlier pronouncement in *Bright v. City of Evanston*, 139 N.E.2d 270, 274 (Ill. 1957), was even more graphic in its statement of the general rule:

A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy. On the other hand, where the claim is merely that the enforcement or application of a particular classification to the plaintiff's property is unlawful and void, and no attack is made against the ordinance as a whole, judicial relief is appropriate only after available administrative remedies have been exhausted.

See also *Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill. App. Ct. 1976).

tial standard of review at issue found in *W.M. Schlosser* and in *Armistead*. It does not entail the trial de novo found in *Stude* and *Horton*. Although the state trial court's review extends to "all questions of law and fact presented by the entire record," it may not hear new evidence and must accept the agency's findings and conclusions on questions of fact as "prima facie true and correct." 735 ILCS § 5/3-110. Judicial scrutiny with this level of deference to the decision of the administrative agency certainly cannot be characterized as within the original jurisdiction of the court. An action for judicial review under IARA is not a "trial de novo wholly without reference to what may have been decided by the [administrative agency]." *Horton*, 367 U.S. at 355. It is an appellate proceeding and, as such, it is not a "civil action . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441(a).

Illinois' administrative review procedure scheme also permits an attack on the facial validity of the statute; such attack can be brought independently of the administrative action or it may also be brought—as it was here—in the action for judicial review under the IARA. If only facial attacks are brought in the administrative review procedure, we may assume that, under the approach taken by the Supreme Court in *Stude* and *Horton*, the action in the state court would be considered an original action that raised a federal question and was therefore subject to removal to the district court. See 28 U.S.C. § 1441(a).

2.

In addition to review under the Illinois administrative review scheme, Illinois courts also recognize the bringing of a separate action under 42 U.S.C. § 1983 to challenge the federal constitutionality of the administrative action. See *Stratton v. Wenona Community Unit Dist. No. 1*, 551 N.E.2d 640, 646 (Ill. 1990). Although there is precedent to the contrary in another part of the country,

see *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992), both the Illinois Supreme Court and this court have held that such a suit will be entertained both with respect to facial and "as applied" challenges to the administrative action. *Id.*; see also *Davis v. City of Chicago*, 53 F.3d 801, 802-03 (7th Cir. 1995); *Rogers v. Desidero*, 58 F.3d 299, 301 (7th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1562 (1996); *Button v. Harden*, 814 F.2d 382, 384-85 (7th Cir. 1987). Such a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record. Under these circumstances, if the § 1983 action were brought alone or with other claims not confined to the administrative record, the rule of *Stude* and *Horton* would allow removal to the federal court.

D.

Here, the two complaints for administrative review filed in the Circuit Court of Cook County and removed to the district court contain facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension,¹⁸ and claims based on state grounds that clearly require the exhaustion of the administrative process and that must be adjudicated on the basis of the administrative record. We therefore must decide whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible.

This court already has confronted a situation in which certain aspects of a state proceeding, if segregated from the remainder of that proceeding, could be characterized as a civil action within the original jurisdiction of the district court while other aspects of the same state proceeding could not be so characterized. That case provides sig-

¹⁸ It is unnecessary for us to determine whether these claims can be said to be grounded in § 1983.

nificant guidance. In *Francis J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994), the court was confronted with an attempt to remove a complaint that contained claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with other claims that were clearly subject to removal pursuant to 28 U.S.C. § 1441(a). The court held that, under those circumstances, the case could not be removed to the district court. The starting point of the court's analysis was the text of section 1441(a) which, the court noted, "only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts." *Francis J.*, 19 F.3d at 340. "By the plain meaning of § 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts." *Id.* The court therefore concluded that, "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then as a consequence of § 1441(a), the whole action cannot be removed to federal court." *Id.* at 341.

In reaching that conclusion, the court took into account the possible applicability of section 1441(c) as an alternate basis for removal. *Id.* at 340 n.4. The court held that, under this subsection as well, the plain language of the statute created an insuperable barrier to removal. Judge Flaum, writing for the court, noted that the language of subsection (c) of the statute provided that "the entire case may be removed and the district court may determine *all* issues therein." *Id.* (emphasis added). Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from any adjudication in federal court, reasoned Judge Flaum, the district court could not determine "all issues therein." *Id.*

In our case, the two complaints originally filed in the Circuit Court of Cook County and then removed to the district court contained federal constitutional allegations that arguably could have been removed to the district court had they been brought alone. The complaints also contained, however, requests for the review of the agency's actions in denying the specific permits for which the plaintiffs had applied. These latter matters, *grounded in state law*, were clearly subject to the judicial review process outlined in IARA and, therefore, the review in the Circuit Court of Cook County was limited to the administrative record. As we already have noted, such appellate review can hardly be characterized as a "claim" in an "original action." Under these circumstances, the case removed to the district court cannot be termed a "civil action . . . of which the district courts . . . have original jurisdiction" within the meaning of section 1441(a).

Nor do we believe that section 1441(c) provides an alternate basis for removal. Although the situation presented here is not identical in all respects to the situation presented in *Francis J.*, the basic reasoning of that case is applicable. Section 1441(c) permits removal only of otherwise non-removable "claims" or "causes of action." In the context of section 1441, which clearly contemplates the assumption of the responsibilities of a court of original jurisdiction by the district court, we think that these terms must be read to presuppose the existence of a "civil action." Therefore, because the district court cannot exercise original jurisdiction over "all issues therein," removal cannot be supported by section 1441(c).¹⁴

¹⁴ We cannot accept, therefore, the submission that, because the College's complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution, the district court's jurisdiction in this case may be premised on 28 U.S.C. § 1331, the federal question statute. In effect, the defendants assert that these claims are separate and distinct from the arguments raised on administrative review. The defendants, in essence, argue that we should view the College's "Complaint for Ad-

We hold, therefore, that the College's complaints for administrative review are not "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441(a). Removal of the complaints is barred, and the College's claims must be remanded to the Circuit Court of Cook County for determination. Accordingly, the judgment of the district court is reversed and the case remanded to the district court with instructions to remand cases 91 C 1587 and 91 C 5564—the College's complaints for administrative review—to the Cook County Circuit Court.¹⁵

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court
Appeals for the Seventh Circuit

ministrative Review" as a claim for administrative review coupled with a removable "civil action . . . of which the district courts . . . have original jurisdiction." We note, however, that 28 U.S.C. § 1331, like the diversity statute, confers only "original jurisdiction of . . . civil actions." In this critical respect, therefore, there is no difference between federal question and diversity cases for purposes of applying the teachings of *Stude* and *Horton*. See *Trapp*, 373 F.2d at 383 ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332.").

¹⁵ The district court also dismissed case 91 C 7849—the federal declaratory judgment action—with prejudice as moot and with leave to reinstate if the court's judgments in cases number 91 C 1587 and 91 C 5564 were vacated, reversed or remanded on appeal. In light of our holding, we remand case number 91 C 7849 to the district court so that it may determine, in the first instance, the appropriate treatment of this declaratory judgment action pending resolution of the College's administrative review claims.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Date: August 1, 1996

Before: HONORABLE WILLIAM J. BAUER, Circuit Judge
HONORABLE KENNETH F. RIPPLE, Circuit Judge
HONORABLE WALTER JAY SKINNER, District
Judge *

Nos. 95-1315 & 95-1293

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit
corporation, UNITED STATES SECTION OF THE INTER-
NATIONAL COLLEGE OF SURGEONS, a not-for-profit cor-
poration, ROBIN CONSTRUCTION CORPORATION, a for-
profit corporation,

Plaintiffs-Appellants

v.

CITY OF CHICAGO, a municipal corporation, COMMISSION
ON CHICAGO LANDMARKS, Administrative Agency of the
City of Chicago, PETER C.B. BYNOE, Commission Chair-
man, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 5564, John F. Grady, Judge

* The Honorable Walter Jay Skinner of the United States District
Court for the District of Massachusetts is sitting by designation.

JUDGMENT—WITH ORAL ARGUMENT

The judgment of the District Court is REVERSED,
with costs, and the case is REMANDED, in accordance
with the decision of this court entered on this date.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

No. 91 C 5564

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION

This is a consolidated action for administrative review of a decision by the defendant Commission on Chicago Landmarks ("the Commission"), an agency of the City of Chicago. Plaintiffs are the International College of Surgeons ("ICS"), the United States Section of the ICS ("the U.S. Section"), and Robin Construction Corporation ("Robin"). Defendants are the City of Chicago ("the city"), the Commission, the Commission members, the commissioner of the city Department of Buildings,

and two nonprofit neighborhood organizations which participated in the administrative hearings as interested parties. Those organizations are the 1500 Lake Shore Drive Building Corporation and the North State, Astor, Lake Shore Drive Association.

In their First Amended Consolidated Complaint for Administrative Review, plaintiffs seek review of the Commission's decision denying four demolition permits and an economic hardship exception that would have allowed plaintiffs to tear down all but the front facades of two landmark buildings ICS and its U.S. Section now own on Lake Shore Drive in Chicago. Plaintiffs also raise several state and federal constitutional challenges to the city's ordinance governing the designation and preservation of landmark buildings ("the Landmarks Ordinance"), its ordinance designating the ICS property as a landmark building ("the Designation Ordinance"), and the Commission's application of the Landmarks Ordinance to the ICS property. For the reasons stated in this opinion, the court affirms the Commission's decisions and enters summary judgment for defendants on the remainder of plaintiffs' claims.

BACKGROUND

For much of the Nineteenth Century, Chicago's industrial and business elite lived in opulent mansions along Prairie Avenue on the city's South Side. But as bridges spread development north across the Chicago River, and as Chicago chugged its way toward becoming what Carl Sandburg dubbed "the city of the big shoulders," Prairie Avenue's proximity to the railroads and factories made it a less fashionable residential address. Led by pioneer entrepreneur Potter Palmer, many of the city's wealthiest persons moved to Lake Shore Drive around the turn of the century. Palmer's castle-like residence at 1350 North Lake Shore Drive is now gone, as are all but seven of the elegant homes that once lined the stretch of Lake Shore

Drive from Oak Street to North Avenue. On June 28, 1989, the Chicago City Council adopted the Designation Ordinance designating these seven houses in the 1200 and 1500 blocks of the Drive as historic landmarks. The "Seven Houses on Lake Shore Drive District" thus fell under the jurisdiction of the Commission on Chicago Landmarks, which has authority under the city's Landmarks Ordinance to grant or deny permits for the demolition or alteration of landmark buildings.

Two of the buildings in the "Seven Houses" district are owned by plaintiffs ICS and its U.S. Section. ICS is a 14,000-member nonprofit organization dedicated to the advancement of surgery and the education of surgeons worldwide. The Edward T. Blair House, a four-story mansion at 1516 North Lake Shore Drive, was designed by William Kendall of the New York architectural firm of McKim, Mead & White. Completed in 1914, the Blair House was purchased by plaintiff ICS in 1947 for \$85,000.00. The Eleanor Robinson Countiss House, which at 1524 North Lake Shore Drive lies adjacent to the less spacious Blair House, was completed in 1917. Its architect, Howard Van Doren Shaw, modeled the house after the Petit Trianon, a three-story Versailles mansion built in 1770 for Louis XV's paramour, Madame de Pompadour. (To the dismay of some architectural purists, including Frank Lloyd Wright, Shaw added a fourth floor to the Countiss House.) ICS acquired the Countiss House in 1950 for \$185,000.00. Both the Blair and Countiss houses have rear coach houses. ICS maintains offices in the Blair House and operates the "International Museum of Surgical Science" in the Countiss House.

ICS wants to demolish the rear, side and coach house portions of the properties so plaintiff Robin can build a 41-story mixed-use condominium tower on the site, leaving only the front facades of the original structures. Through a contract of sale of the Blair and Countiss houses to

Robin, ICS hopes to realize a return of \$17 million. Authorized representatives of ICS signed that contract in February 1989, although the contract was contingent upon, among other things, final approval of ICS's Board of Governors. Plaintiffs' Appendix to Summary Statement of Facts and Memorandum of Law in Support of the Consolidated Complaint for Administrative Review ("Plaintiffs' Appendix"), Exh. 11 at ¶ 24. The ICS governing board ratified the contract on October 10, 1989. Report of Proceedings Re: Economic Hardship Exception Hearing ("Hardship Hearing Record"), at 34.¹ The dates are significant only insofar as defendants argue that adoption of the Designation Ordinance in June 1989 predated the final ratification of the contract by several months. On October 10, 1990, ICS applied to the Commission for four demolition permits that would allow ICS to demolish the coach houses and the side and rear portions of the Blair and Countiss houses. The Commission's permit process is set out in the city's Landmarks Ordinance² and the Com-

¹ The record of the economic hardship hearing, which was held over several days in March and May of 1991 before the Commission, is broken into several lettered volumes. For the sake of clarity, the court will refer to the hearing transcripts and exhibits as the "Hardship Hearing Record" and will cite to the volume only where necessary to aid the reader. Volume A of the record consists of the demolition permit hearing transcript, which the court will refer to as the "Demolition Hearing Record."

² The ordinance provides that no city department may grant a permit for demolition or alteration of a landmark building without the Commission's written approval. Chicago Municipal Code, Ch. 2-120, § 740. It provides that the Commission should issue a "preliminary disapproval" of an application for such a permit if the Commission finds the proposed work "will adversely affect or destroy any significant historical or architectural feature of the improvement or the district or is inappropriate or inconsistent with the designation of the structure, area, or district, or is not in accordance with the spirit and purposes of this ordinance" *Id.*, § 780. Within 10 days of receiving notice of the preliminary dis-

mission's rules and regulations.³ The Commission gave the permits preliminary disapproval on October 23, 1990, and

approval, the applicant may request an informal conference with the Commission "for the purpose of securing compromise regarding the proposed work so that the work will not in the opinion of the Commission adversely affect any significant historical or architectural feature of the improvement or district" *Id.*, § 790. If an informal conference does not result in an accord or if one is not requested, the application goes to a public hearing before the Commission, which then issues a written decision, containing findings of fact, approving or disapproving the application. *Id.*, § 800. The written decision is a final administrative decision appealable to the state court under the Illinois Administrative Review Law. *Id.*, § 810; 735 ILCS 5/3-101 *et seq.* If the Commission makes a final decision to deny a permit, the applicant may ask the Commission for an "economic hardship" exception "on the basis that the denial of the permit will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830.

³ The Commission's regulations governing demolition permit applications in landmark districts call for the agency to evaluate whether the property sought to be demolished contributes to the character of the district. Rules and Regulations of the Commission on Chicago Landmarks, Art. IV(C)(1). Factors to be considered include whether the subject property exhibits the "critical features" of landmark designation, and whether it has the general site characteristics, size, shape and scale associated with the landmark district. *Id.* After a permit has been denied, issues relevant to an application for an economic hardship exception include: the applicant's knowledge of the landmark designation at the time of acquisition; the current level of economic return on the property (including the date of purchase, the purchase price, income from the property, any remaining mortgage debt, real estate taxes, and recent appraisals of the property); any recent offers for sale or purchase; and the infeasibility of profitable alternative uses for the property (including the economic feasibility of rehabilitating or reusing the building as is). *Id.*, Art. V(A)(1-4). The applicant for an economic hardship exception carries the burden of proving by clear and convincing evidence "that the existing use of the property is economically infeasible and that the sale, rental, or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return." *Id.*, Art. V(C).

conducted a public hearing on December 18, 1990. After the hearing, the four demolition permits then received the Commission's final disapproval on January 9, 1991. ICS then applied for an economic hardship exception, and the Commission held a public hearing on March 5, March 7, May 7 and May 8 of 1991. On July 3, 1991, the Commission issued its final written denial of an economic hardship exception.

This action is here on removal from the state court, given plaintiffs' federal constitutional claims that the Landmarks Ordinance, the Designation Ordinance, and the Commission's conduct of the administrative procedures violated various of plaintiffs' federal due process and equal protection rights. In a memorandum opinion dated January 10, 1992 ("Memorandum Opinion"), this court dismissed with prejudice several of plaintiffs' equal protection and due process claims, including the claim that the Landmarks Ordinance effected an unconstitutional "taking" of plaintiffs' property. Several claims remain. Plaintiffs claim that the Designation Ordinance violated plaintiffs' federal and state equal protection and due process rights by unfairly treating the subject properties differently from other properties with respect to landmark status. They also argue that the Commission violated equal protection and due process by conducting the demolition hearing in a biased and unfair manner. The rest of plaintiffs' claims arise exclusively under state law. Plaintiffs contend the Landmarks Ordinance violates the separation of powers doctrine derived from the Illinois Constitution by improperly delegating legislative power to the Commission. They argue that the Landmarks Ordinance, on its face and as applied by the Commission also constituted a wrongful "taking" without just compensation under the Illinois Constitution. In addition, plaintiffs argue that the Designation Ordinance constitutes unlawful "special legislation" in violation of the Illinois Constitution, and that ICS has vested rights in the proposed development of the 41-story project. Finally, plaintiffs seek administrative review of the Com-

mission's July 3, 1991, final decision denying plaintiffs the economic hardship exception they needed to proceed with the development.

This opinion will analyze the federal claims and then move on to the state claims, over which the court will exercise supplemental jurisdiction. With regard to the complaint for administrative review, Illinois law grants to the trial court the power to affirm or reverse the administrative agency in whole or in part. 735 ILCS 5/3-111(5). Such a decision is made on the basis of the administrative record. The parties have treated plaintiffs' federal and state challenges to the administrative decisions and the ordinances underlying the procedures as ripe for decision on the record, in effect asking the court to determine whether summary judgment on those issues is appropriate. Accordingly, the court will treat those claims as if cross-motions for summary judgment are pending, since the parties have had a full opportunity to submit exhibits, affidavits and other evidence.⁴ The record now consists of

⁴ There is no summary judgment motion pending. However, plaintiffs have represented to the court that all their claims, including those raising federal constitutional issues, may be resolved on the record and without a trial as a part of the administrative review of the Commission's decisions. See Transcript of Proceedings, March 31, 1993, at 4; Plaintiffs' Reply Memorandum of Law in Support of Consolidated Complaint for Administrative Review ("Plaintiffs' Reply"), at 2. District courts may grant summary judgment *sua sponte* "when the outcome is clear, so long as the opposing party has had an adequate opportunity to respond." *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987) (quoting *Smith v. DeBartoli*, 769 F.2d 451, 452 (7th Cir. 1985), cert. denied, 475 U.S. 1067 (1986)). The Seventh Circuit generally instructs the district court to notify the parties of its intentions to grant or consider summary judgment, so that an adequate opportunity to respond may be had. *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993). But in this case, at the March 31, 1993, status hearing, plaintiffs' counsel actually encouraged the court to decide the entire matter on the record. At a subsequent status hearing, the court inquired as to whether plaintiffs had sufficiently developed the record as to certain issues, and plaintiffs' counsel

hundreds of pages of administrative hearing transcripts and exhibits, to which the parties have referred in their briefs. The briefs themselves amounted to nearly 300 pages, not including exhibits.

ANALYSIS

I. Plaintiffs' Federal and State Equal Protection and Due Process Claims

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. See *Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986).

A. The Designation Ordinance Did Not Violate Plaintiffs' Federal Equal Protection Rights.

Plaintiffs' first federal claim alleges that the city, through its Designation Ordinance creating the "Seven Houses" landmark district, has unfairly singled out ICS

responded that "[e]ither we did or we didn't, but we are bound by the record in my mind." Transcript of Proceedings, April 21, 1993, at 13. The court finds plaintiffs had notice that the case would be decided in a summary judgment posture. Plaintiffs also had an adequate opportunity to respond, and they chose to stand on the record. Therefore it is appropriate for the court to treat the case as if cross-motions for summary judgment were pending.

and treated its properties differently than similarly situated properties. Specifically, plaintiffs argue that the "Seven Houses" designation protects every facade of every building, whereas the city's 1985 designation of the nearby East Lake Shore Drive District protects only the landmark buildings' portions that can be seen from the public way. Plaintiffs also argue that the city violated their equal protection rights by refusing their proposed changes to the Blair and Countiss houses while allowing certain structural changes to other buildings within the "Seven Houses" district. Third, plaintiffs argue that the Designation Ordinance "arbitrarily groups seven noncontiguous buildings" into the landmark district when the seven "cannot even be viewed as one unified district" and when the district does not include other landmark-quality buildings located among the seven on the same stretch of Lake Shore Drive.

When the court denied a motion to dismiss this equal protection claim in January 1992, the court's opinion cited *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989). The basic assumption behind plaintiffs' claim is that a statute or government action may violate equal protection by creating a class of one. In essence, this theory of equal protection holds that when the government singles out an individual for differential treatment, that act itself creates a classification that may violate the equal protection clause, even if the individual plaintiff is not actually a member of a disfavored class of individuals, as would be the case in the traditional approach to equal protection. See *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (explaining *Falls* without resolving its tension with cases requiring equal protection claims to be based on plaintiff's membership in a class). But in *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), *aff'd*, — U.S. —, 114 S.Ct. 807 (1994), the Seventh Circuit implicitly overruled *Falls* when it held that "the state's act of singling out an individual for differential treatment does not itself create the class." *Id.*

(emphasis in original) (internal quotation marks omitted). See also *Lucien v. Peters*, 840 F. Supp. 591, 593 (N.D. Ill. 1994) (noting that under Seventh Circuit's *Albright* opinion, allegations of individual—and not class-based—discrimination are insufficient to make out an equal protection claim); *Lucas v. Village of LaGrange*, 831 F. Supp. 1407, 1417 (N.D. Ill. 1993) (same).

Plaintiffs, perhaps wisely, do not cite *Falls*. But the theory behind their equal protection claim is a *Falls*-type theory. Plaintiffs are alleging that the city has singled out ICS, as an individual property owner, for disparate treatment. This sort of claim cannot survive after *Albright*. Moreover, plaintiffs' own photographic exhibits appear to show that the south-facing facade of the Blair House is visible from Lake Shore Drive, and that the house's side, rear and coach house are visible from the public alley⁸ in

⁸ Illinois courts have interpreted the phrase "public way" as "an area accessible to the public." *People v. Pennington*, 172 Ill. App.3d 641, 527 N.E.2d 76, 78 (2d Dist. 1988) (quoting *People v. Ward*, 95 Ill. App.3d 283, 419 N.E.2d 1240, 1244 (2d Dist. 1981)). In *Pennington*, the Illinois Appellate Court held that a privately owned sidewalk adjacent to a college dormitory was a "public way" for purposes of the state's aggravated battery statute, because the sidewalk was accessible to the public and was commonly used as a walkway by college students. *Id.* A number of state courts have held that alleys are public ways. See, e.g., *Western Union Tel. Co. v. Dickson*, 173 S.W.2d 714, 717 (Tenn. Ct. App. 1941) ("Streets and alleys are both public ways intended primarily for the use of the public in passing to and fro. For most purposes the only difference between them is width."); *Kansas City S. Ry. v. Boles*, 115 S.W. 375, 377 (Ark. 1908) ("alleys were held to be one of the public ways under the control of the municipal authorities"); *Johnston v. Lonstorf*, 107 N.W. 459, 461 (Wis. 1906) ("An alley of small dimensions actually used by only a limited number of persons, but which the public have a general right to use therefore may be regarded as a public way."). Courts have held particular pathways or passages to be outside the definition of "public way" when they are not traversed by persons, see *Jefferson County v. South Cent. Bell Tel. Co.*, 555 S.W.2d 629, 632 (Ky. Ct. App. 1977) (sewage easement was not "public way" because it was designed to accommodate the flow of sewage, and not the passage of people), or

the rear of the building. See Hardship Hearing Record, Vol. D, Exhs 306, 313. A portion of the north-facing facade of the Countiss House also appears to be visible from Lake Shore Drive. See *id.*, Vol. F, Exh. 403. And while the city allowed changes to other buildings in the "Seven Houses" district, there is no dispute that these were relatively minor interior and exterior changes, and nothing on the order of the demolition of all but the front facades, as plaintiffs wish to alter their property. See Defendants' Memorandum in Support of Their Response to Plaintiffs' Consolidated Complaint for Administrative Review ("Defendants' Memorandum"), Exh. L.

As to plaintiffs' claim that the "Seven Houses" district was arbitrarily drawn because it consists of separate blocks and excludes other buildings between those blocks, plaintiffs cite the testimony of Carroll William Westfall, an architectural historian. Westfall testified before the Commission that the district is "predominantly weighted in favor of houses" and that the Designation Ordinance's drafters "failed then to look for the tall buildings that could fill out and explain the actual history of North Lake Shore Drive by a reasonable designation And more realistically, all of the buildings on North Shore [sic] Shore drive and predating 1930 ought to be included in the district." Report of Proceedings Re: Demolition Permit Application Hearing Held December 18, 1990 ("Demolition Hearing Record"), at 147. Westfall's testimony, however, fails to create a genuine issue as to whether the Designation Ordinance was arbitrary, as plaintiffs' argue.

when they are not generally accessible to the public without permission of private property owners. See *Green Bay and W. R.R. Co. v. Transportation Comm'n*, 365 N.W.2d 909, 910 (Wis. Ct. App. 1985) (snowmobile trails across private property could not be regulated as "public ways" because of "the transient nature of the public's right to use the trails" for purposes other than snowmobiling). These cases aptly demonstrate that the public alley behind the ICS properties is a "public way," within the generally understood meaning of that term.

Plaintiffs do not dispute that the "Seven Houses" district includes structures originally built as houses, not multi-family buildings or high-rises, and that the seven houses in the district are the last such mansions remaining on the Drive between Oak Street and North Avenue. *Id.* at 168-69. Historians such as Westfall might prefer that a landmark district commemorate the history of Lake Shore Drive as a whole, or of residential living on the Drive in general. But that does not mean the city acted arbitrarily in shaping the district to preserve what it refers to as "the swan song of a particular period of residential architecture for North Lake Shore Drive." Defendants' Memorandum, Exh. D at 11. Plaintiffs' evidence does not genuinely dispute that the houses in the 1200 and 1500 blocks of the Drive "stand as valuable reminders of an illustrious part of the past of this famous street. Taken individually, each portrays the work of a distinguished and celebrated American architect. Collectively, each block strongly conveys the historical and aesthetic image of late nineteenth- and early-twentieth century Lake Shore Drive." *Id.* Westfall admitted as much on cross-examination. Demolition Hearing Record at 177.

These undisputed facts about the "Seven Houses" district also defeat plaintiffs' argument that the East Lake Shore Drive District, which is composed of high-rises, is "similarly situated." Therefore it is immaterial that the city has, as plaintiffs point out, permitted a high-rise redevelopment on the Mayfair Hotel property on East Lake Shore Drive. In short, the question of whether the city has "singled out" the ICS properties is not material, after *Albright*, for purposes of plaintiffs' equal protection argument. Even if that question were material, there is no genuine dispute that the city did not single out the Blair and Countiss houses or treat them differently than other similarly situated properties through the Designation Ordinance.

B. Plaintiffs' "Singling Out" Claim Also Fails Under Federal Due Process and State Constitutional Law.

Plaintiffs' also advance the same arguments in support of their claim that the Designation Ordinance violated their federal substantive due process rights and state constitutional rights to due process and equal protection. The state and federal due process claims fail for the reasons stated above, as plaintiffs have not demonstrated a genuine issue as to whether the Designation Ordinance was arbitrary or capricious. The state equal protection argument falls along with the federal claim, that Illinois courts generally analyze equal protection in the same way as do federal courts. *See Illinois Housing Dev. Auth. v. Van Meter*, 82 Ill.2d 116, 412 N.E.2d 151, 152-53 (1980) ("If a suspect classification or fundamental right is not found, the legislation simply must bear a rational relationship to a legitimate government interest.").

The language of *Van Meter* does suggest that the Illinois courts might be more generous than the Seventh Circuit regarding plaintiffs' "singling out" argument. In that vein, plaintiffs concede that the Designation Ordinance creates no suspect classification, but they argue that their property rights are "fundamental" for purposes of the equal protection analysis in *Van Meter*. But *Van Meter* listed the right to travel, the right to vote, and the right to fair treatment in the criminal process as "fundamental" rights. *Id.* at 152-53. Even if that list is not all-inclusive, plaintiffs' right against the alleged disparate treatment of their property would not be deemed "fundamental" in this sense. Fundamental rights "are those that 'lie at the heart of the relationship between the individual and republican form of nationally integrated government.'" *Committee for Educ. Rights v. Edgar*, — Ill. App. 3d —, 641 N.E.2d 602, 606 (1st Dist. 1994) (quoting *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483,

470 N.E.2d 266, 277 (1984)). For example, in *Van Meter*, the Illinois Supreme Court declined to consider a person's right to find adequate housing as fundamental. *Van Meter*, 412 N.E.2d at 153.

So with no suspect classification or fundamental right at issue, the Illinois courts would apply a rational relationship test to plaintiffs' "singling out" argument. Plaintiffs have not produced evidence that would allow a reasonable trier of fact to reach any conclusion other than that the preservation of the last seven mansions on North Lake Shore Drive is a legitimate goal, or that the Designation Ordinance bears a rational relationship to that goal. Westfall, who was plaintiffs' primary witness on this point, admitted that the history of the seven mansions should be preserved, and that the "Seven Houses" district preserved them. Demolition Hearing Record at 176-77.

C. Plaintiffs Present No Triable Issue as to Whether Their State and Federal Due Process Rights Were Violated by the Commission's Alleged Bias.

Plaintiffs also contend that their state and federal due process and equal protection rights were violated by the way the Commission conducted the administrative proceedings. Essentially, plaintiffs argue that the city and the Commission conferred landmark status on the Blair and Countiss houses and then denied plaintiffs a fair administrative hearing as part of an ongoing, deliberate effort to squelch plaintiffs' plans to redevelop the property into a high-rise. As evidence, plaintiffs cite "[t]he Commission's actions, as described throughout this brief." Plaintiffs' Summary Statement of Facts and Memorandum of Law in Support of the Consolidated Complaint for Administrative Review ("Plaintiffs' Memorandum"), at 107.

Plaintiffs begin by referring to the Commission's written denial of the economic hardship exception. Plaintiffs cite

page 27 of that document for the proposition that the defendants knew of plaintiffs' plans to redevelop the Blair and Countiss houses prior to the enactment of the Designation Ordinance. Plaintiffs' Memorandum at 107. But that page simply outlines the notice and hearing procedures the Commission followed in its consideration of whether to recommend that the City Council designate the seven houses as landmarks. Plaintiffs' Appendix, Exh. 6 at 27. Also, the Commission's knowledge of plaintiffs' redevelopment plans does not in itself support the inference that the Commission or the city deliberately set out to destroy those plans.

Plaintiffs' brief goes on to discuss the alleged inadequacy of notice of the city's consideration of the Designation Ordinance, and the Commission's refusal during the demolition permit hearings to receive evidence concerning plaintiffs' redevelopment plans. Viewing these facts with inferences drawn in the light most favorable to plaintiffs, the court cannot conclude that they create a genuine issue as to whether the city acted under some grand plan aimed more at stopping the development than at preserving landmarks. What plaintiffs need is evidence that would allow a trier of fact to find an ulterior motive on behalf of the city or the Commission. For example, plaintiffs might have demonstrated a genuine issue had they produced evidence that the Blair and Countiss houses did not deserve landmark status but received it anyway, or that the city designated only the Blair and Countiss houses, ignoring other similarly situated landmark properties. Notwithstanding plaintiffs' fruitless argument that the "Seven Houses" district was drawn arbitrarily, plaintiffs do not dispute that the district includes all seven of the remaining mansions from the Potter Palmer era, and that the Blair and Countiss houses are worthy of landmark designation. Moreover, the court already ruled in January 1992 that the Commission's notice procedures under the Landmarks Ordinance

do not on their face deny due process, and that the Commission's refusal to receive the redevelopment evidence did not violate due process. Memorandum Opinion at 12-13.

Despite the court's 1992 ruling, plaintiffs revive their due process argument that the Commission did not give them fair notice that the city was considering a preliminary landmark designation that would encumber plaintiffs' property rights. Plaintiffs' argument is now recast as an "as applied" challenge. Obviously, if the city deviated from an otherwise constitutional set of procedures by failing to give proper notice or postdeprivation process, plaintiffs' due process rights could be violated. But there is no such evidence in the record here. The city's initial notice to plaintiffs came in a June 1, 1988, letter informing ICS that its property was being considered for landmark designation. Plaintiffs argue that the letter did not discuss the ramifications of preliminary designation or offer ICS an opportunity to be heard. After reading the letter, the court disagrees. The letter states the date, time and place of an upcoming Commission meeting (one month later) at which the Commission "will make a decision on whether or not to pursue designation for the Seven Houses on Lake Shore Drive" Plaintiffs' Appendix, Exh. 9. The letter lists the specific addresses of the Blair and Countiss houses. *Id.* It specifically states that the meeting is "open to the public" and that ICS should "please feel free to attend." *Id.* The letter's failure to invite comment explicitly does not render it constitutionally inadequate, and even if the letter were inadequate, it does not establish that plaintiffs did not receive meaningful postdeprivation process at the Commission's subsequent April 26, 1989, public hearing, which ICS attended. *See id.*, Exh. 6 at 27; Memorandum Opinion at 12-13 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985)). Plaintiffs have failed to establish a genuine issue of material fact relative to their argument that the Commission's actual notice constituted an "as applied" due process violation.

In another attempt to restructure an argument previously rejected by the court, plaintiffs argue that their due process rights were infringed when the Commission refused at the demolition permit hearing to consider evidence of the proposed redevelopment of the ICS property. But they advance no reason why the court should decide the question any differently than it did in its January 1992 opinion, which was based on the irrelevance of the redevelopment evidence to the central issue before the Commission: whether the Blair and Countiss houses, in their current state (and not in the state they would be *after* the proposed redevelopment), contributed to the character of the "Seven Houses" district. See Memorandum Opinion at 13. The same reasoning defeats plaintiffs' argument that the Commission was biased and violated due process when it refused, during the demolition permit hearing, to allow plaintiffs to cross-examine witness Dennis McFadden about the proposed redevelopment.

Plaintiffs offer a variety of other evidence to support their argument of Commission bias, but none of it establishes a genuine issue. Plaintiffs complain that Westfall was not permitted to testify about the purported flaws in the designation of the "Seven Houses" district. While the record shows the Commission's chairman refused to hear Westfall's testimony to that effect, see Demolition Hearing Record at 155, Westfall still was permitted to give ample testimony about his opinion that the district was poorly drawn and underinclusive for its lack of high-rise buildings. *Id.* at 147-48, 173.

Plaintiffs find Commission bias in the chairman's statement during the demolition hearing that "[t]he Commission has two witnesses that we would like to present to give testimony opposing the applicant's request for demolition permits." *Id.* at 186-87. The chairman later stated that "I maybe used the word 'we' too freely." *Id.* at 188. In any event, plaintiffs are grasping at straws here, and the offhand statements or misstatements of the Commission chairman do not establish a genuine issue. Cf. *United*

States v. Dumont, 936 F.2d 292, 297 (7th Cir.) ("Extemporaneous speech by a judge who may not have been paying attention to nuance does not preclude a more considered decision later."), *cert. denied*, 112 S.Ct. 399 (1991).

Plaintiffs also argue unfair bias stemming from the Commission's retention of two expert witnesses who testified at the demolition hearing. But it is well-established under federal and state law that in the administrative setting, some mixture of judicial and prosecutorial function is acceptable and does not, without more, violate due process. See *Vukadinovich v. Board of School Trustees*, 978 F.2d 403, 412 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 133 (1993); *Sharma v. Zollar*, — Ill. App.3d —, 638 N.E.2d 736, 743 (1st Dist. 1994). Plaintiffs must overcome the presumption that the administrative adjudicators are persons "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Vukadinovich*, 978 F.2d at 412 (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)). Plaintiffs present much argument but no evidence to overcome this presumption. They present no evidence that Commission members, who actually ruled on the demolition permits, themselves performed any quasi-prosecutorial role. See *Sharma*, 638 N.E.2d at 743-44. Moreover, the Commission allowed counsel for ICS to conduct a vigorous cross-examination of one of the Commission's witnesses, Howard Decker, on the issue of bias. Demolition Hearing Record at 235-37. The Commission's retention of the witnesses did not render the proceeding unfair so as to deny plaintiffs due process.

Plaintiffs next point to the Commission's refusal to hear evidence or hold a hearing on a substitute designation ordinance that ICS suggested as a means of changing the boundaries of the "Seven Houses" district. In recommending the denial of the substitute ordinance on January 9, 1991, the Commission noted that ICS had presented "no new evidence" that would support an amendment of the

district boundaries. Plaintiffs' Appendix, Exh. 5. Plaintiffs complain that this ground for decision defies due process because the Commission refused to hold a hearing at which new evidence could be received. But there appears to be little or no connection between plaintiffs' attempts to change the district boundaries and the question of whether due process was observed during the enactment of the original Designation Ordinance or during the permit and economic hardship exception hearings. At the time they sought the amendment, their buildings had already been designated as landmarks. The change in legal status occurred with the enactment of the original Designation Ordinance in June 1989, and prior to that, in April 1989, plaintiffs were afforded a predeprivation hearing which they do not now challenge. Due process generally is not violated if the deprivation of a protected property interest takes place after a proper notice and hearing. See *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

Finally, plaintiffs argue that the Commission violated due process by granting "interested party" status to the two defendant neighborhood organizations during the administrative hearings, and by denying the demolition permits without making its own written findings of fact as required by the city's Landmarks Ordinance. Plaintiffs cite no authority for the proposition that these actions constitute the sort of Commission bias that would so infect the proceedings as to violate due process. As to the interested parties, plaintiffs cite *Landmarks Preservation Council v. City of Chicago*, 125 Ill.2d 164, 531 N.E.2d 9 (1988). But the *Landmarks* case merely held that two organizations with no more than an aesthetic interest in the underlying litigation did not have standing in the lawsuit. *Id.* at 13. It does not support plaintiffs' arguments concerning commission bias or due process, and it does not bar the Commission from granting "interested party" status to such organizations during public hearings "as a tool to assist the municipality in performing its legislative

function." *Id.* at 14.⁶ As to the Commission's denial of the demolition permits, the Commission expressly incorporated a set of written findings into its decision. Plaintiffs' Appendix, Exh. 5. These findings were drafted by the Commission staff rather than by the Commission members, but that does not violate due process or the city's Landmarks Ordinance. Once the Commission adopted the findings, they became the findings of the Commission. Plaintiffs cite *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196 (7th Cir. 1989), in which the Seventh Circuit spoke disapprovingly of an administrative law judge's adoption of findings of fact prepared by the agency's enforcement division, which had brought the administrative action. *Id.* at 198-99. In this case, only ICS and the two neighborhood organizations were parties to the action. Had the Commission adopted a set of findings drafted by the interested parties, ICS might have a good argument that the Commission failed to make its own independent findings. But the Commission's adoption of the written findings prepared by its own staff does not establish bias on the part of the Commission.

Taken individually and collectively, plaintiffs' cited examples of alleged bias by the Commission, when viewed in light of the undisputed facts, do not amount to a state or federal due process or equal protection violation, for the reasons stated above. The court will therefore enter summary judgment in favor of the defendants on all of the remaining federal claims in the case. Although the court has discretion under 28 U.S.C. § 1367(c) to decline to exercise jurisdiction over the remaining state claims, see *Carnegie-Mellon Univ. v. Cohill*, 484 U.S.

⁶ Plaintiffs cite the Commission chairman's statement that the *Landmarks* case "seems to run contrary to our ordinance and our regulations," Demolition Hearing Record at 7, but they do not point out that the chairman made that statement after counsel for ICS summarized the *Landmarks* case without distinguishing between standing to bring suit and standing to participate in a public hearing. *Id.* at 6.

343, 350-51 (1988), the court will continue to exercise supplemental jurisdiction, in the interest of judicial economy, fairness and comity. *See Timm v. Mead Corp.*, 32 F.3d 273, 276-77 (7th Cir. 1994). This case is more than three years old, and, like the court in *Timm*, this court sees "no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the . . . state law issues anew in state court." *See id.* at 277. Clearly, the exercise of jurisdiction would best serve the interests of economy, convenience, fairness and comity in this case. This court's considerable investment of time into the case places it in the best position to resolve the remaining issues expeditiously.

II. Plaintiffs' Remaining State Law Claims

A. The Landmarks Ordinance Does Not Violate State Nondelegation Principles and Is Not Unconstitutionally Vague.

Plaintiffs attack the Landmarks Ordinance as vague and as a violation of the Illinois Constitution's provisions concerning the separation of powers. Plaintiffs complain in particular that the Landmarks Ordinance does not provide adequate standards for the Commission in making landmark designations, in reviewing permit applications, and in considering applications for economic hardship exceptions. By not providing clear, intelligible standards, the Landmarks Ordinance unconstitutionally delegates legislative power to the Commission, plaintiffs argue.

The Illinois constitutional doctrine of separation of powers provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. art. I, § 1. According to the Illinois Supreme Court, a valid delegation of legislative authority to an administrative agency requires that the legislative body provide sufficient indication of (1) the persons and activities potentially subject

to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm. *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill.2d 361, 369 N.E.2d 875, 879 (1977). As to the first requirement, the legislature must do all that is practical to define the scope of the legislation, so interested parties have notice of the possibility that administrative actions may affect them. *Id.* But what is "practical" may be limited by the complexity of the subject being regulated. *Id.* As to the second requirement, lawmakers may use "somewhat broader, more generic language" than required for the first element, and it is sufficient if the types of harm sought to be prevented by the statute are apparent from its language. *Id.* As to the third requirement, the legislature must specifically enumerate the administrative tools and the particular sanctions, if any, that are intended to be available to the agency. *Id.*

The court has little difficulty concluding that the Landmarks Ordinance satisfies the test enunciated in *Stofer*. In enumerating the Commission's powers and duties, the ordinance charges the agency, among other things, with "identifying those areas, districts, places, buildings, structures, works of art, and other objects of historic or architectural significance," and with advising and assisting "owners or prospective owners of designated or potential landmarks or structures in landmark districts on technical and financial aspects of preservation, renovation, rehabilitation, and reuse" Chicago Municipal Code, Ch. 2-120, § 610 (1990). Plaintiffs argue that this provision insufficiently describes the persons or activities to be regulated because it does not define what constitutes a landmark. However, delegation standards should not be treated in isolation, but in light of the purpose, factual background and context of the statute. *People v. Carter*, 97 Ill.2d 133, 454 N.E.2d 189, 191 (1982) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), *appeal dismissed*, 465 U.S. 1055 (1984). Another provision of the ordinance lists seven criteria which

the Commission is supposed to apply in considering whether a building or district should be a landmark:

—Its value as an example of the architectural, cultural, economic, historic, social or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States.

—Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements.

—Its identification with a person or persons who significantly contributed to the architectural, cultural, economic, historic, social, or other aspect of the development of the City of Chicago, State of Illinois, or the United States.

—Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials, or craftsmanship.

—Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, State of Illinois, or the United States.

—Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous.

—Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.

Chicago Municipal Code, Ch. 2-120, § 160 (1990).

The above criteria, coupled with the stated purposes of the statute, make clear the persons and activities which may be regulated under the Landmarks Ordinance. The criteria also clearly identify the harm sought to be prevented, despite plaintiffs' meritless argument that the or-

dinance is insufficient because it identifies only the converse proposition, or the benefits to be gained from landmark designation and preservation. *See Gray v. Department of Labor*, 176 Ill. App.3d 285, 531 N.E.2d 32, 35 (3d Dist. 1988) (inferring, from statute's language requiring the payment of the prevailing hourly rate to construction workers on certain public works improvements, that statute sought to prevent the harm of substandard work on public projects) *appeal denied*, 124 Ill.2d 554, 535 N.E.2d 914 (1989); *Friendship Facilities, Inc. v. Region 1B Human Rights Auth.*, 167 Ill. App.3d 425, 521 N.E.2d 578, 581 (3d Dist. 1988) (holding that statute enacted to safeguard the federal and state constitutional rights of disabled persons sufficiently indicated the types of evil the statute was designed to prevent). Finally, the Landmarks Ordinance's enumeration of the Commission's powers and duties adequately sets out the means by which the Commission may fulfill the purposes of the ordinance. The statute empowers the Commission to identify buildings for landmark designation; to recommend that the City Council designate such buildings; to review proposals to alter, destroy or add to landmarks; and to consider landowners' pleas that landmark status works an economic hardship upon them. *See Chicago Municipal Code*, ch. 2-120, § 610.

With respect to permit review, § 800 provides that the Commission's final written decision must contain the factual findings "that constitute the basis for the decision, consistent with the criteria in § 2-120-740." *Id.*, § 800 (emphasis added). Section 740 provides that written Commission approval is required for any permit concerning a landmark structure when the following criteria are present:

- (1) where such permit would allow the alteration or reconstruction of or addition to any improvement which constitutes all or part of a landmark or proposed landmark;

(2) where such permit would allow the demolition of any improvement which constitutes all or part of a landmark or proposed landmark; or

(3) where a permit would allow the construction or erection of any addition to any improvement or the erection of any new structure or improvement on any land within a landmark district; or

(4) where a permit would allow the construction or erection of any sign or billboard within the public view which may be placed on, in or immediately adjacent to any improvement which constitutes all or part of any landmark or proposed landmark.

Id., § 740. Plaintiffs in effect argue that while these criteria may define the categories of permit applications that are subject to Commission review, they do not guide the Commission in how to exercise that review. Although that might be true if § 740 stood alone, the court cannot read § 740 in isolation. Section 800, by requiring the Commission's final written decision on permit applications to be "consistent with" the criteria in § 740, obviously instructs the Commission to consider whether a proposed permit would result in the alteration or destruction of a landmark. The Commission in this case followed that instruction when it denied plaintiffs' permit application to tear down all but the front facades of the Blair and Countiss Houses, having determined that the other exterior facades should be preserved because they constituted "critical features" of the landmark. Therefore the concept of "critical features" is not made up out of whole cloth, as plaintiffs contend. Instead it is a criterion that appropriately implements the ordinance by providing a reasonable basis for distinguishing between those proposed alterations that are "consistent with" preservation of the landmark and those that are not.

With respect to the Commission's consideration of an economic hardship exception once a permit has been denied, the statute defines the basis for the exception as

a showing that the denial of the permit deprives the applicant of "all reasonable and beneficial use of or return from the property." *Id.*, §§ 830, 850. The statute then authorizes the Commission to develop regulations "that describe factors, evidence and testimony that will be considered by the Commission in making its determination." *Id.*, § 830. The Commission's regulations set out a variety of relevant factors and require the applicant to bear the burden of proving by clear and convincing evidence that "the existing use of the property is economically infeasible and that the sale, rental or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return." Rules and Regulations of the Commission on Chicago Landmarks, Art. V; *see supra*, n. 3. As is the case with the criteria governing the Commission's permit review, the court concludes that the statute adequately describes the means by which the Commission is to carry out the ordinance's purposes, under the third prong of *Stofer*. Plaintiffs argue that the words "all reasonable and beneficial use of or return from the property" are subject to myriad interpretations, but in fact they describe a relatively technical concept in the field of land use. Indeed, several of the witnesses at the economic hardship hearing gave specific testimony and opinions regarding whether landmark status deprived plaintiffs of "all reasonable and beneficial use of or return from" the Blair and Countiss houses. Reading the ordinance as a whole, the court concludes that it clearly describes the persons and activities subject to Commission regulation, the Commission's mission and the means available to carry out that mission. Therefore the city's administrative scheme for landmarks does not run afoul of the separation of powers doctrine under the Illinois Supreme Court's analysis in *Stofer*.

Plaintiffs' challenge to the ordinance relies heavily on the argument that the criteria for landmark designation are too vague to give the Commission adequate guidance in designating landmarks and thus in administering the

ordinance. With respect to the criteria enumerated in § 620, "theme" can mean virtually anything, and almost any building can be argued to have contributed to some "aspect of development" somewhere in the United States, plaintiffs argue. But this argument ignores the complex interrelationship between architecture, history, economics and cultural and social factors. It suggests, for example, that the first brick bungalow erected on a given Northwest Side street could be designated a landmark because it had historical significance in the development of that street, and thus the city. But the ordinance instructs the Commission to look to a milieu of considerations, and it is this milieu that would distinguish our hypothetical bungalow from, say, the South Side bungalow where the late Richard J. Daley resided.

Under the Landmarks Ordinance, the Commission sits as a sort of expert panel to help the City Council identify landmarks for designation, and to review permits for reconstruction, alteration or demolition of landmarks. So long as the statute sets intelligible standards for the Commission, it does not violate nondelegation principles. *Hill v. Relyea*, 34 Ill.2d 552, 216 N.E.2d 795, 797 (1966). To make the agency's standards "intelligible," the legislature need not establish "[a]bsolute criteria whereby every detail necessary in the enforcement of a law is anticipated." *Id.* Illinois courts recognize that the precision of the standards will vary along with "the nature of the ultimate objective and the problems involved." *Id.* In *Hill*, a statute authorized the superintendent of a state mental hospital to discharge an involuntarily committed patient "as the welfare of such person and of the community may require" *Id.* at 796. The Illinois Supreme Court upheld the statutory provision as a valid delegation of power, in recognition of the superintendent's expertise in determining when a patient may safely be released. *Id.* at 797-98. Here, the Landmarks Ordinance has put forth an intelligible set of standards for the Commission to consider in determining whether a structure

warrants landmark protection. The nature of the ordinance's objectives and the complexity of the problems with which the ordinance is concerned negate the need to set more precise standards. *See id.* at 798. Although *Hill* predates *Stofer*, it is in accord with *Stofer's* pragmatic approach to analyzing delegation problems. As the Illinois Supreme Court stated in *Stofer*, "[i]n many cases, it is simply impractical for legislators to become and remain thoroughly apprised of the facts necessary to determine which aspects of that activity are harmful and how they might be modified." *Stofer*, 369 N.E.2d at 878. Citing *Hill*, the Illinois Supreme Court in *People v. Carter*, 97 Ill.2d 133, 454 N.E.2d 189 (1982), *appeal dismissed*, 465 U.S. 1055 (1984), analyzed a delegation of power to an executive branch agency without using the *Stofer* approach. *Carter* involved a challenge to the Franchise Disclosure Act's provision allowing the state attorney general to grant exemptions from the Act "if he finds that the enforcement of this Act is not necessary in the public interest." *Carter*, 454 N.E.2d at 190. The court held that the "in the public interest" standard, when considered in conjunction with the statute's overall purposes and context, "is an intelligible standard which survives constitutional scrutiny." *Id.* at 190-91. The administrative scheme in this case provides significantly more guidance for the agency than did the "in the public interest" standard in *Carter* and the "welfare" standard in *Hill*.

Plaintiffs cite *Waterfront Estates Dev. Inc. v. City of Palos Hills*, 232 Ill. App.3d 367, 597 N.E.2d 641 (1st Dist. 1992), in which the Illinois Appellate Court held unconstitutional a municipal ordinance providing that certain building permits could not be issued without approval from an "appearance commission." *Id.*, 597 N.E.2d at 646. Approval of the "appearance commission" hinged on whether the proposed building "will be inappropriate to, or incompatible with, the character of the surrounding neighborhood." *Id.* at 647. The court held these standards to be inadequate under the state's nondelegation doc-

trine and constitutional standards of vagueness. *Id.* at 648-49. Plaintiffs attempt to draw an analogy between the Landmarks Ordinance and the language of the ordinance in *Waterfront Estates*. But the Landmarks Ordinance, when viewed as a whole, provides a far more detailed set of instructions to the agency than did the municipal ordinance at issue in *Waterfront Estates*. Although it is true that the Landmarks Ordinance uses the terms "inappropriate" and "inconsistent" to guide the Commission in whether to give preliminary disapproval to a permit application, see Chicago Municipal Code, Ch. 2-120, § 780, the Commission's permit review criteria also may be found in § 800 and § 740, as discussed above. Section 780 also specifically refers to the "spirit and purposes" of the ordinance, which are listed in § 580. Moreover, whether an improvement or demolition is "inappropriate" or "inconsistent" with respect to a landmark or landmark district, within the context of the goals of the Landmarks Ordinance, is a more specific, technical issue than whether a general building permit in a residential neighborhood is "inconsistent" or "incompatible with" that neighborhood. A whole set of different concerns is at play in the landmarks context, and the ordinance spells out those concerns in its statement of purposes. *Id.*, § 580. Therefore the court does not view *Waterfront Estates* as controlling in this case. Curiously, the *Waterfront Estates* court did not cite *Hill* or *Stofer*, although it appeared to follow the *Hill* approach. *Waterfront Estates*, 597 N.E.2d at 646. In any event, there is considerable overlap between the *Hill* and *Stofer* approaches, and under either, the Landmarks Ordinance does not violate nondelegation principles of the Illinois Constitution.

As to plaintiffs' vagueness challenge, Illinois courts follow the rule that an ordinance is unconstitutional if it is "so vague that persons of common intelligence must necessarily guess at its meaning." *Waterfront Estates*, 597 N.E.2d at 649 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)). For the same reasons the Landmarks

Ordinance provides the Commission with intelligible standards, it also is not unconstitutionally vague. The ordinance does not require persons of common intelligence to guess at its meaning. See *Coronet Ins. Co. v. Washburn*, 201 Ill. App.3d 633, 558 N.E.2d 1307, 1312 (1st Dist. 1990).

There being no genuine dispute as to the issue of vagueness and unlawful delegation of legislative power, summary judgment on those issues is appropriate.

B. The Designation Ordinance Is Not Unlawful Special Legislation.

Plaintiffs attack the Designation Ordinance as "special legislation" forbidden by Article IV, Section 13 of the Illinois Constitution. But the Illinois Supreme Court has held that the same standards applied in federal and state equal protection analysis are used to determine whether a statute constitutes unlawful special legislation. *Van Meter*, 412 N.E.2d at 155 (citing *S. Bloom, Inc. v. Mahen*, 61 Ill.2d 70, 76-77, 329 N.E.2d 213 (1975)). "Thus, the special legislation section of the Illinois Constitution allows differentiations between similarly situated persons if the classification bears a rational relationship to a legitimate legislative purpose." *Van Meter*, 412 N.E.2d at 155 (citing *Anderson v. Wagner*, 79 Ill.2d 295, 315, 402 N.E.2d 560 (1979) *appeal dismissed*, 449 U.S. 807 (1980)).

Part I(B) of this opinion concluded that the Designation Ordinance did not offend state concepts of equal protection, and the same analysis applies to plaintiffs' special legislation argument. There is no genuine dispute as to whether preserving the last seven mansions on Lake Shore Drive from Oak Street to North Avenue is a legitimate governmental objective, or whether the Designation Ordinance is rationally related to that goal. Plaintiffs again argue that there is no difference between the mansions in the "Seven Houses" district and other nondesignated

buildings along that stretch of Lake Shore Drive or buildings designated as part of the East Lake Shore Drive District. Plaintiff's Memorandum at 102. But the undisputed facts do not support that argument. As the court concluded earlier in this opinion, the undisputed facts show that the "Seven Houses" district's inclusion of the last remaining mansions from the Potter Palmer era distinguish it from the other buildings in the area and on East Lake Shore Drive. Therefore those other property owners are not "similarly situated" with respect to plaintiffs, and even if they were, the Designation Ordinance passes the rational relationship test. By disposing of plaintiffs' special legislation argument in this fashion, the court does not reach defendants' arguments that the special legislation provision does not apply to municipalities.

C. The Landmarks Ordinance's Economic Hardship Provisions, On Their Face and As Applied, Do Not Amount to a "Taking" Under the Illinois Constitution.

In its January 1992 ruling, this court rejected plaintiffs' facial and as-applied challenges to the Landmarks Ordinance under the federal constitutional prohibition against uncompensated takings. Memorandum Opinion at 7-10. Defendants now contend that the Court also ruled on plaintiffs' state constitutional takings claims. But the opinion clearly addressed only the federal takings issues. *Id.* Plaintiffs argue that the state takings clause affords property owners more protection than the federal clause, and that the economic hardship provisions of the Landmarks Ordinance effected a taking in violation of the state constitution.

We can begin with the premise that the Illinois Constitution provides greater protection to landowners than does the federal takings clause. The cases cited by plaintiff do support this proposition. See *St. Lucas Ass'n v. City of Chicago*, 212 Ill. App. 3d 817, 571 N.E.2d 865, 875 (1st

Dist. 1991); *Equity Assocs., Inc. v. Village of Northbrook*, 171 Ill. App.3d 115, 524 N.E.2d 1119, 1126 (1st Dist.), *appeal denied*, 122 Ill.2d 573, 530 N.E.2d 243 (1988); *Department of Transp. v. Rasmussen*, 108 Ill. App.3d 615, 439 N.E.2d 48, 54 (2d Dist. 1982). But plaintiffs' briefs stop short of probing the nature of the additional protection, and defendants simply counter that the additional protection does not extend to regulatory zoning, without explaining why. The text of the Illinois Constitution of 1970 provides that "[p]rivate property shall not be *taken or damaged* for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Ill. Const. art. I, § 15 (emphasis added).⁷ The federal takings clause provides only that "nor shall private property be *taken* for public use without just compensation." U.S. Const. amend. V (emphasis added). Therefore the textual difference between the two provisions is the state constitution's prohibition of uncompensated "damage" to property.

The words "or damaged" were added to the state constitution in 1870 to allow for compensation to landowners who sustained harm to their property rights as a result of activities that did not amount to takings. *Rasmussen*, 439 N.E.2d at 54. But the Illinois courts have interpreted "damage" under § 15 to require a "direct physical disturbance" peculiar to the property. *Id.* *Equity Assocs.*, another case relied on by plaintiff, illustrates this point. In *Equity Assocs.*, the defendant Village of Northbrook had

⁷ For purposes of the court's analysis, § 15 of the 1970 state constitution does not differ in relevant part from the Illinois Constitution of 1870, in which railroads received special treatment and the right to a jury determination was not available when the state was the condemnor. See Ill. Const. of 1870 art. II, § 13. At the state constitutional convention in 1970, the drafters considered and rejected a proposal to add to § 15 the phrase "or the use thereof impaired" after the word "damaged" in the first sentence. Robert A. Helman & Wayne W. Whalen, *Constitutional Commentary*, S.H.A. Const. Art. I, § 15.

filed an earlier suit against the plaintiff developers and Cook County to enjoin the issuance of a county building permit for an office development on land adjacent to the village's boundary. *Equity Assocs.*, 524 N.E.2d at 1121. Plaintiffs argued that the village's suit had prevented them from developing the property and thus constituted "damage" under § 15, but the Illinois Appellate Court affirmed the lower court's dismissal of the complaint. *Id.* at 1124. "Plaintiffs' arguments that defendants' actions prevented them from exercising their rights to 'physically' develop or use their property miss the point. It is a physical disturbance to property, not the prevention of its physical development, which constitutes damage requiring just compensation." *Id.* (citing *Rigney v. City of Chicago*, 102 Ill. 64 (1881)). *St. Lucas Ass'n*, the third case cited by plaintiffs in the case at bar, cited *Rigney* and *Citizens Util. Co. v. Metropolitan Sanitary Dist.*, 25 Ill. App.3d 252, 322 N.E.2d 857 (1st Dist. 1974), for the statement that the Illinois Constitution is broader than the United States Constitution on the question of takings. *St. Lucas Ass'n*, 571 N.E.2d at 875. But *Rigney* and *Citizens Util. Co.* both discuss "damage" as a "direct physical disturbance of a [property] right." *Rigney*, 102 Ill. at 81; *Citizens Util. Co.*, 322 N.E.2d at 861. Admittedly, a physical disturbance to "a right" may appear to be different and perhaps broader than a physical disturbance to the property itself. *See id.* More recent Illinois cases such as *Rasmussen* and especially *Equity Assocs.*, however, have not recognized any such distinction.

In this case, the parties dispute the effect of landmark designation on the fair market value of the Blair and Countiss properties. But plaintiffs have presented no evidence that defendants caused any direct physical disturbance to their property rights. As the Illinois Appellate Court held in *Equity Assocs.*, an interference with plaintiffs' right to "physically" develop the property is not enough. Plaintiffs here have shown nothing more than this. Perhaps that explains why plaintiffs never directly

argue that the Landmarks Ordinance or the Commission's actions caused compensable "damage" to the property under § 15. But no other argument is available to support their contention that the broader protection of the Illinois Constitution entitles them to relief.

To the extent plaintiffs argue that the Landmarks Ordinance and the Commission's actions under the ordinance constituted a "taking" under the Illinois Constitution, the Illinois cases dictate roughly the same analysis as this court's approach to plaintiffs' federal takings claims. In short, land-use regulations do not amount to a taking unless they deprive the landowner of all or substantially all economically viable uses of the property. *See Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App.3d 863, 617 N.E.2d 1227, 1243-45 (2d Dist.), *appeal denied*, 152 Ill.2d 581, 622 N.E.2d 1229 (1993); *St. Lucas Ass'n*, 571 N.E.2d at 876. In *Tim Thompson*, a developer wanted to build three single-family houses on three lots, but the defendant city enacted a zoning ordinance increasing the minimum lot size so that only two homes could be built on the property. *Tim Thompson*, 617 N.E.2d at 1231-33. The Illinois Appellate Court reasoned that the developer still had an economically viable use for the property, and that the city did not effect a taking by denying the developer its "optimally desired" use of the land. *Id.* at 1245. Even though the developer could not realize as much profit from the project as it had originally anticipated, it could at most allege a diminution of value of the parcel, and such allegations were insufficient to state a takings claim. *Id.* In *St. Lucas Ass'n*, the owners of a cemetery tried unsuccessfully to change the zoning of part of the property from single-family residential to allow commercial development. They then challenged the denial as a taking under § 15. Following *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1977), the Illinois Appellate Court held that the denial of the zoning change was not a taking because nothing in the record showed

that it would not be economically viable for the owners to use that portion of the cemetery property as a commercial greenhouse, a use permitted by the existing zoning. *St. Lucas Ass'n*, 571 N.E.2d at 876.

Plaintiffs' facial challenge to the Landmarks Ordinance fails because they do not dispute that the basis for economic hardship exceptions to permit denials under the ordinance is a showing that the denial "will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830. This standard does not violate Article I, § 15 of the Illinois Constitution because it allows the exception to be granted if the permit denial prevents a landowner from having any viable economic use for his or her property. Plaintiffs' as-applied challenge fails because plaintiffs do not genuinely dispute that in spite of their inability to obtain the demolition permits necessary for their proposed redevelopment, they still have an economically viable use for the Blair and Countiss houses as a corporate headquarters or museum.

Although plaintiffs argue that they cannot afford to maintain the Blair and Countiss houses without redeveloping the property into a high-rise, testimony from their own witnesses showed that the lack of funding for the property's upkeep is not due to the Landmarks Ordinance, but to plaintiff ICS's unwillingness to provide the money. When asked by plaintiffs' counsel why ICS would be unwilling to make substantial contributions to maintain and restore the property, ICS World President John Stuart Penton Lumley testified that "the college members look on their commitment to surgical development rather than bricks and mortar and maintaining landmarks. This is, I think, understandable being a surgeon." Hardship Hearing Record at 283. He testified further: "We have asked our members—and I have emphasized that the members themselves think that their finances should go towards surgery and not maintenance of the building." *Id.* at 300.

ICS does not wish to mortgage the property, Lumley testified, because "you actually have to pay it back sometime. Therefore, you are taking on a hell of a headache for the whole of your future generation." *Id.* at 302. Plaintiffs' counsel also elicited from Dr. Pedro A. Rubio, head of ICS's U.S. Section, testimony that generating funds for rehabilitating the Blair and Countiss houses would be "almost impossible" because "physicians don't have as much money as they used to, and they are using it for purposes that are more important than fixing a building." *Id.* at 351.

The foregoing testimony demonstrates that there is no genuine dispute over whether ICS can continue its current use of the buildings. Plaintiffs have presented evidence that ICS does not *want* to fund the maintenance of the buildings because of other priorities. They have not presented evidence that ICS *cannot* maintain the buildings. Even if such evidence were presented, it would probably establish only that the impediment to an economically viable use stemmed from ICS's own particular financial situation or its strategy in maintaining the buildings, and not from any action by the defendants under the Landmarks Ordinance.⁸ The court doubts that such a situation

⁸ Plaintiffs cite a construction consultant's estimate that rehabilitating the building would cost more than \$7 million. But the author of this estimate, dubbed the "Morgan Report," admitted that his estimates included furniture and furnishings and were based on "institutional quality," or "bring[ing] the buildings up to the obvious quality level at which they started." Hardship Hearing Record at 197, 200. Another of plaintiffs' witnesses testified that for \$480,000.00, the buildings could be sealed from any water damage for 25 to 30 years. *Id.* at 160. The ultimate cost of repair needed for the buildings to continue in their current use is disputed by the parties, but that dispute is not material to the question of whether the Landmarks Ordinance or its application by the Commission deprived plaintiffs of all economically viable uses. Otherwise a property owner could deliberately neglect its property, or even damage it, and then claim that land-use regulations effect a taking because the property is so far gone—for reasons unrelated

would constitute a "taking" under federal or state law. Moreover, the court's conclusion that no genuine dispute exists with regard to the economic viability of plaintiffs' continued use of the buildings as an office and museum is supported by the undisputed evidence that ICS and its U.S. Section pay no property taxes on the buildings and own them free and clear of any mortgage. *Id.* at 89. These facts leave ICS to argue that staying in two buildings in one of Chicago's toniest districts facing Lake Michigan, while paying no rent, mortgage debts or taxes, would not be economically viable. Many property owners would envy such an arrangement.

The United States Supreme Court's recent decision in *Dolan v. City of Tigard*, — U.S. —, 114 S.Ct. 2309 (1994), does not change this court's takings analysis. *Dolan* concerned "exactions," or the extent to which local governments may condition the granting of building permits on the applicant's surrender of some particular property right. The Court in *Dolan* held that unless the exaction bears a "rough proportionality" to the impact of the development for which the permit is sought, the exaction is a taking for which the owner must be compensated. *Id.* at 2319. Unlike cases in which land-use regulations limited a property owner's use of its own parcel of land, *Dolan* involved a requirement that the owner actually deed a portion of its property to the local government. *Id.* at 2316.⁹ So although plaintiff cites *Dolan's* discussion of

to the regulations—that the owner's proposed redevelopment is the only remaining viable use.

⁹ Notably, though, the Court in *Dolan* recognized that a taking can occur even if the government's confiscatory action leaves the owner with "some economic use from her property." *Id.* at 2316 n.6 (emphasis in original). But the Court was speaking of a situation, not present in this case, in which the government actually confiscates a portion of the property, leaving the owner with a usable remnant. *Id.* In *Dolan*, the plaintiff wanted to increase the size of the retail store she owned on property lying within a flood-

Illinois law on when an exaction constitutes a taking, that discussion is inapposite here because this is not an exaction case.

For these reasons, the record in this case does not present a genuine dispute as to whether the Landmarks Ordinance, on its face or as applied by the Commission, violated the takings provision in § 15 of the Illinois Constitution. As this court ruled in January 1992 with respect to plaintiffs' federal takings challenge, the Landmarks Ordinance "does not affect plaintiffs' ability to continue using the subject property as a corporate headquarters or museum." Memorandum Opinion at 9 (citing *Penn Central*, 438 U.S. at 121).

D. Plaintiffs Are Not Entitled to Relief Under the Illinois Doctrine of "Vested Rights."

Plaintiffs next contend that they should be allowed to proceed with their planned redevelopment of the Blair and Countiss houses because they have vested rights in the project. They argue that the negotiations leading to ICS's redevelopment contract with Robin were based on existing zoning that unquestionably permitted their proposed 41-story high-rise. Plaintiffs had no reason to think that potential or eventual landmark designation would block the project, they argue, because of a representation in a Commission staff report (tendered to plaintiffs in June 1988) that designation would affect only the portions of the buildings visible from the public way. The city and the Commission then changed their stance in 1989 by designating all of the facades, including those not visible from the public way, plaintiffs maintain.

The Illinois common law doctrine of vested rights allows landowners or developers to proceed with a planned con-

plain. As a condition for the building permit, the local government required plaintiff to dedicate a 15-foot strip of land next to the floodplain for use as a pathway for walking and bicycling. *Id.* at 2314.

struction project based on the original zoning when they have substantially changed their position, made substantial expenditures, or incurred obligations with respect to the project in good-faith reliance on a building permit or the probability of its issuance. *Cos Corp. v. City of Evanston*, 27 Ill.2d 570, 190 N.E.2d 364, 367-68 (1963); *Fifteen Fifty N. State Bldg. Corp. v. City of Chicago*, 15 Ill.2d 408, 155 N.E.2d 97, 101 (1958). But the doctrine does not apply where the landowner makes the expenditures after receiving notice of proposed zoning changes, see *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App.3d 863, 617 N.E.2d 1227, 1237 (2d Dist.), *appeal denied*, 152 Ill.2d 581, 622 N.E.2d 1229 (1993), or where there is a unresolved question over what may be built under the land-use regulations. *Bank of Waukegan v. Village of Vernon Hills*, 254 Ill. App.3d 24, 626 N.E.2d 245, 251-52 (2d Dist. 1993), *appeal denied*, 156 Ill.2d 555, 638 N.E.2d 1112 (1994). The vested rights doctrine is grounded in the desire to avoid the "grave injustice" of allowing municipal officials to deny development rights by changing the rules in the middle of the game. *Cos Corp.*, 190 N.E.2d at 368.

Although the record does not precisely spell out the nature and extent of expenses plaintiffs incurred during the negotiation, execution and ratification of the contract with Robin in 1989, defendants do not dispute that those expenditures were substantial.¹⁰ Rather, defendants maintain that plaintiffs could not have relied on the probability of gaining the necessary permits because they did not apply for the permits until October 1990, more than a

¹⁰ The record includes precious little evidence of substantial expenditures by plaintiffs in reliance on the city's representations. Defendants do not challenge plaintiffs on this issue. However, the Commission's unwillingness to hear evidence of the redevelopment, at the administrative hearing stage, may explain this gap in the record. In any event, the court does not need to reach this issue because the vested rights question can be decided on another ground: whether plaintiffs could have had a reasonable expectation that the necessary permits would issue.

year after the Designation Ordinance had been enacted. Indeed, in several of the Illinois cases in which vested rights were found, the developers' plans or permit applications were in compliance with zoning regulations as they existed at the time the applications were submitted. See *Cos Corp.*, 190 N.E.2d at 366; *O'Connell Home Builders, Inc. v. City of Chicago*, 99 Ill. App.3d 1054, 425 N.E.2d 1339, 1344 (1st Dist. 1981); *People ex rel. First Nat'l Bank & Trust Co. v. Village of Deerfield*, 50 Ill. App.2d 349, 200 N.E.2d 120, 121 (1st Dist. 1964). In the case at bar, it is undisputed that when plaintiffs applied for the four permits needed to demolish portions of the Blair and Countiss mansions and their rear coach houses, the Designation Ordinance was already in effect, so plaintiffs could not have relied on the issuance of the permits that had yet to be considered by the Commission. Plaintiffs also can point to no change in the legal status or designation of their property after they applied for the permits.

But plaintiffs' argument runs somewhat deeper than defendants recognize. Plaintiffs argue that their development rights vested more than two years before they actually applied for the permits. When the city first began the process of designating the Blair and Countiss houses as part of the landmark "Seven Houses" district, the Commission sent its June 1, 1988, letter (discussed in Part I(C) of this opinion), to ICS notifying it of pending proceedings. Plaintiffs' Appendix, Exh. 9. The letter incorporates by reference a "staff analysis of landmark criteria applicable to the district." *Id.* Plaintiffs point to the final sentence of the four-page staff analysis: "As is the case with all districts designated by the Commission, critical features are defined as only those parts of the buildings visible from the public way." *Id.* That sentence, according to plaintiffs, gave rise to the probability that the necessary demolition permits would issue so long as the development plan did not call for the alteration of the front facades of the Blair and Countiss houses. See Plaintiffs' Reply at 42.

Plaintiffs argue that they relied on that sentence when they negotiated the 1989 contract with Robin. The city's subsequent designation of *all* exterior facades as "critical features" of the landmarks, *see* Defendants' Memorandum, Exh. E, § 1, marked a change in the city's stance after plaintiffs' rights in the development already had vested, plaintiffs maintain. Plaintiffs' Reply at 42-43.

Although the record does not detail plaintiffs' "substantial" expenditures in reliance on the representation in the staff analysis, the record is well-developed with regard to the notice plaintiffs received in 1988 about the city's plans to designate the Blair and Countiss houses as landmarks. By focusing on the staff analysis exclusively, plaintiffs ask the court to take a myopic view of the record. The Commission's June 1 letter, to which the staff analysis was attached, told ICS that a decision would be made on July 6, 1988, as to whether the Commission would pursue the designation of the "Seven Houses" district. "Should the Commission decide to pursue designation," the letter continued, "we will again write you to fully explain the reasons for and the effects of landmark designation as well as the various steps involved in the process." Plaintiffs' Appendix, Exh. 9. The letter added that "no final decision is taken until the Commission has first held an informal public meeting for property owners and later a formal public hearing on the matter." *Id.*

After the Commission gave the district "preliminary designation" on July 6, it dispatched a letter dated the same day to ICS. The July 6 letter informed ICS that any permit applications from that point on would have to be reviewed by the Commission. *Id.*, Exh. 10. Echoing the statement in the staff analysis, the July 6 letter then said, "the Commission is only concerned with permits relating to those parts of the buildings visible from the public way," but it also stated that the Commission's review authority "applies both to alterations to existing structures and for new construction within historic districts." *Id.*

The letter continued: "We urge that, should you be contemplating any changes to your property, you call the Commission staff to discuss these in advance." *Id.*

The critical question here is whether the city's representations could give rise to a good-faith reliance by plaintiffs on the probability of permits being issued for their proposed development. The answer must be no. The Commission's June 1 and July 6 letters, coupled with its July 6 decision to include the Blair and Countiss houses within the preliminary designation of the "Seven Houses" district, unquestionably raised a cloud over plaintiffs' development rights.¹¹ From that point on, plaintiffs had notice that their development could not proceed without receiving permit approval from the Commission. The two letters did *not* say that the Commission would approve any permit for alteration or destruction of all but the front facades of the landmark houses. They did not say the Commission would not later decide to deem the rear, side and coach house portions of the ICS property to be critical features. They *did* say that no final decisions had been made and that any construction-related changes to the property would have to be approved by the Commission. The July 6 letter went so far as to "urge" ICS to contact the Commission staff if ICS contemplated "any changes" to the property.

Admittedly, the letters muddled the water by saying the Commission was concerned only with what could be seen

¹¹ Defendants argue that such a cloud already existed as early as 1982, when the Illinois Department of Conservation placed the Blair and Countiss houses on the Illinois Register of Historic Places. *See* Hardship Hearing Record at 62. But defendants do not seriously contend that the 1982 state designation encumbered plaintiffs' property rights or did anything more than signal to plaintiffs that their longstanding redevelopment plans might have to overcome objections from preservationists. It is undisputed that the first notice to ICS of designation interest on the part of the city or the Commission—the agencies with the power to approve the needed permits—came on July 1, 1988.

from the public way. But the fact that they did not signal a clear entitlement to the type of permits plaintiffs later sought makes the case analogous to *Bank of Waukegan*. In *Bank of Waukegan*, a developer wanted to build an apartment building on a piece of property that at one time was subject to a "special-use" zoning classification that allowed apartments. But the special-use zoning was tied to an annexation agreement that had expired. *Bank of Waukegan*, 626 N.E.2d at 248. The developers argued they had vested rights because, at the time they made substantial expenditures, the special-use zoning was on the village maps. *Id.* at 250. The developers also noted that they had obtained a copy of a letter, written by a colleague of the village attorney, stating that the special-use zoning was still in effect. *Id.* at 247-48, 251. On the other side of the scales, the village manager had told one of the developers he believed the special-use zoning had expired, and the village president had stated at a public meeting that he believed the property's zoning was in question. *Id.* at 251. The Illinois Appellate Court held that on these facts, the trial court properly denied the developers' plea for declaratory relief on the ground of vested rights. *Id.* at 251-52. The court reasoned that "while the developers had received definite indications" that their project was permissible under the zoning, "there was always a question as to what the property's zoning classification was in the minds of the parties." *Id.* at 251. The court added:

A reading of the record shows that instead of proceeding cautiously and making sure that all "i's" were dotted and "t's" were crossed with regard to zoning when the developers ran into problems, Mr. Parikh [the developers' agent] simply went ahead with the developers' plans based on his own belief that a special-use permit was still in force for the property. As noted, the village added a certain amount of fuel

to Mr. Parikh's fire, but it did not lead him to believe that the zoning question was a closed one.

Id. at 252.

The same reasoning is applicable to the case at bar, where the undisputed facts show that the defendants' representations to plaintiffs would not lead a reasonable person to rely on the issuance of the necessary demolition permits.¹² The instigation of designation proceedings instead raised a host of questions over future development rights with respect to the Blair and Countiss houses, despite the language plaintiffs argue they relied on. Plaintiffs here needed to dot the "i's" and cross the "t's," because as one Illinois court put it, a vested right is "more than a mere expectation based on anticipation of the continuance of existing zoning law; it must have become a title, legal or equitable, to the present or future enjoyment of property." *County of Kendall v. Aurora Nat'l Bank*, 219 Ill. App.3d 841, 579 N.E.2d 1283, 1289 (2d Dist. 1991), *appeal denied*, 143 Ill.2d 639, 587 N.E.2d 1016 (1992). In addition, plaintiffs are hard-pressed to argue that they did not know during contract negotiations of the possible impact of the city's designation plans on their development rights, given that the contract itself requires Robin to pay all of ICS's legal fees "for services rendered in connection with Seller's efforts in opposing City of Chicago landmark status for the Property" Plaintiffs' Appendix, Exh. 11 at ¶ 16; *see also id.* at ¶ 2 (making title subject to "any pending proceedings by the City of

¹² There is no dispute that plaintiffs' redevelopment proposal would be allowed under the property's zoning, which did not change with the landmark designation. The analogy to *Bank of Waukegan* lies in the city's land-use regulations as a whole, including the procedures for Commission review of applications for permits to demolish portions of landmark structures. The cloud over the special-use zoning in *Bank of Waukegan* is like the cloud over whether plaintiffs here could obtain Commission approval for the permits needed to redevelop the Blair and Countiss houses into a 41-story building.

Chicago for imposing city landmark status and possible City of Chicago landmark status"). The contract bears a date of February 1989. Any contention that plaintiffs did not know at that time that possible landmark designation could affect the right to develop the property is untenable given the wording of the contract. Moreover, even if the demolition permits that were necessary after enactment of the Designation Ordinance could be said to have been a sure thing, it is undisputed that plaintiffs still needed Chicago Plan Commission approval under the city's Lakefront Protection Ordinance, and their application for that approval remained pending at the time of the economic hardship hearing in May 1991. Hardship Hearing Record at 413.

This case is unlike those in which Illinois courts have applied the doctrine of vested rights. In *Constantine v. Village of Glen Ellyn*, 217 Ill. App.3d 4, 575 N.E.2d 1363 (2d Dist. 1991), the defendant village's building and zoning official had told the plaintiff landowners that their lot, though small, was buildable, and that he would issue them a building permit, but the village subsequently denied the permit because the lot was too small. *Id.* at 1365-66. In *O'Connell*, the defendant city amended the zoning restrictively after plaintiff had applied for a building permit that would have been issued under the zoning in effect at the time of the application; there was no evidence that the plaintiff knew or could have known of the amendment. *O'Connell*, 425 N.E.2d at 1343. In *Cos Corp.*, the defendant city told the plaintiff its building plans complied with the zoning and included sufficient parking spaces, but the city subsequently delayed acting on the permit application for several months and amended the zoning to increase the number of required parking spaces more than threefold. *Cos Corp.*, 190 N.E.2d at 366-67. In each of these cases, the plaintiffs had unequivocal indications that their projects could move forward and had no way of knowing that the defendant municipalities were

about to scotch the projects by changing the land-use laws. But in the case at bar, the undisputed facts show plaintiffs had adequate notice of the impending landmarks designation, and of the uncertainty such a designation would create with respect to plaintiffs' plans to redevelop their properties. There being no genuine issue of material fact as to whether plaintiffs had vested rights, the court will enter summary judgment on this claim.

III. Plaintiffs' Complaint for Administrative Review

A. Standard of Review

The heart of plaintiffs' administrative review complaint is its plea for reversal of the Commission's July 3, 1991, final decision denying plaintiffs' application for an economic hardship exception that would have allowed them to destroy all but the front facades of the Blair and Countiss houses, despite the landmark status of the property. Unlike the court's *de novo* review of plaintiffs' other federal and state law claims, review of the administrative agency's action is governed by the Illinois Administrative Review Law, 735 ILCS 5/3-101 *et seq.*

The Administrative Review Law provides that the agency's findings of fact on review "shall be held to be prima facie true and correct." 735 ILCS 5/3-110. Illinois courts define the scope of review as an inquiry into whether the agency's findings are against the manifest weight of the evidence. *Launius v. Board of Fire & Police Comm'rs*, 151 Ill.2d 419, 603 N.E.2d 477, 481 (1992), *cert. denied*, 113 S.Ct. 2337 (1993). To find the agency's decision was against the manifest weight of the evidence, the reviewing court "must be able to conclude that all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous, and that the opposite conclusion is clearly evident." *O'Boyle v. Personnel Bd.*, 119 Ill. App.3d 648, 456 N.E.2d 998, 1002 (1st Dist. 1983) (internal quotation

marks and citation omitted). The agency's factual determinations therefore are not against the manifest weight of the evidence "unless there is a complete absence of facts in the record supporting the conclusion reached." *Ross v. Civil Serv. Comm'n*, 250 Ill. App.3d 597, 621 N.E.2d 159, 163 (1st Dist. 1993). The reviewing court must not re-evaluate the credibility of the witnesses who testified before the agency. *Id.* It must not reweigh the evidence or substitute its own judgment if substantial evidence supports the agency's judgment. *Hall v. Board of Educ.*, 227 Ill. App.3d 560, 592 N.E.2d 245, 255 (1st Dist. 1992). In short, reversal of the agency is not justified simply because the reviewing court believes it might have ruled differently or believes in the reasonableness of the conclusion opposite from the agency's. *Id.*; *O'Boyle*, 456 N.E.2d at 1002-03.

In denying plaintiffs' application for an economic hardship exception, the Commission made ten findings upon its consideration of "the entire record." See Plaintiffs' Appendix, Exh. 6 at 11-29. Five of the findings were in support of the Commission's conclusion that denial of the demolition permits did not deprive plaintiffs of all reasonable and beneficial use of the Blair and Countiss houses. The other five were in support of the Commission's conclusion that plaintiffs were not deprived of all reasonable and beneficial return from the property. Plaintiffs argue that each of the findings is against the manifest weight of the evidence or is arbitrary and capricious.

B. The Commission's Conclusion That Plaintiffs Were Not Deprived of All Reasonable and Beneficial Use of the Property Was Not Against the Manifest Weight of the Evidence.

1. Evidence Supported the Commission's Finding That the Landmark Designation of Plaintiffs' Property Does Not Prevent Plaintiffs' Traditional Use of That Property.

The Commission's written decision stated that plaintiffs never questioned, during the administrative hearings, the suitability of the Blair and Countiss houses, in their current condition, for use by ICS as a headquarters and museum. *Id.* at 11. The Commission observed that because the landmark status of the property affected only the exteriors of the buildings, and not the interiors, landmark designation did not affect ICS' ability to continue using the buildings as it had for more than 40 years. *Id.* at 12. In addition, the Commission noted plaintiffs' argument that landmark status was imposing more than \$7 million in repairs upon ICS in order for it to maintain its existing use of the buildings. *Id.* The Commission dismissed the argument, stating "there is nothing mandated by landmark designation which requires an owner to maintain property in any manner greater" than that provided by city building codes. *Id.*

As observed earlier in this opinion, there is ample evidence in the record to support the conclusion that landmark status is not an impediment to the continued use of the property as a headquarters and museum. Landmark status did not change the fact that ICS owns the property free and clear of any mortgage or property tax obligations. Hardship Hearing Record at 89. Clearly the record was devoid of evidence that landmark status, resulting as it did in the denial of demolition permits for plaintiffs' plan to raze all but the front facades of the property, in any way regulated or changed the manner in which ICS had been using the buildings. The only real issue here is

whether ICS was prevented from continuing its existing use because of the allegedly prohibitive cost of repair. But as noted earlier in this opinion, plaintiffs' own evidence included testimony by high-ranking ICS officials that the organization and its membership simply are not committed to financing the upkeep of its buildings. *Id.* at 283, 300, 302, 351. Plaintiffs correctly point out that the evidence overwhelmingly showed that repairs need to be made. But such evidence does not show that landmark designation precludes ICS from making the repairs. Plaintiffs argue that in considering an economic hardship application, the Commission "must take the owner and the property as it finds them," Plaintiffs' Reply at 54, but even if the court accepts that proposition, there is no evidence that the Commission did not do exactly that.

Moreover, evidence in the record supports the Commission's finding that the Morgan Report's \$7.2 million repair estimate included work that was far beyond what was required under the building code and that was not mandated by the landmark status of the property. *See supra*, n.8. The estimate included the cost of landscaping; repaving outdoor concrete and brick walkways; "miscellaneous site work" for as yet undiscovered problems; replacing gutters and downspouts; refinishing of wood floors to their original quality; bringing marble surfaces to their original quality; refinishing wood paneling and restoring a set of elaborate wood cabinets and inlaid book cases; "architectural repairs due to mechanical and electrical work"; retiling the bathrooms; and purchasing interior furniture and furnishings, to mention but some items. Hardship Hearing Record at 180-197. In addition, the Commission heard testimony from another consultant that the Morgan Report is "the kind of estimate that would kill a project stone dead or at least send you back to the drawing board There are a lot of items in there that you could do without." *Id.* at 672.

This evidence supports the Commission's finding and will not be reweighed by this court. Nor does the court

accept plaintiffs' argument that the Commission erred by even considering whether ICS could continue its existing use of the property. Plaintiffs argue that the Commission's use of the words "traditional use" meant that it did not consider whether ICS has lost "all reasonable and beneficial use" of its property. But the Commission's written findings clearly can be read as concluding that the existing or "traditional" use is an economically viable one. *See* Plaintiffs' Appendix, Exh. 6 at 12 ("The Commission notes that the Applicant has successfully used its Properties in a traditional manner since it acquired them over forty years ago, and finds no logic in the Applicant's contention that the recent landmark designation in any way deters this use from continuing into the future.")

2. The Commission's Finding That Poor Stewardship of the Property by ICS May Be the Only Impediment to Continuance of the Existing Use Was Not Improper.

The Commission made a finding that the owner's neglect of the Blair and Countiss houses may be the only impediment to the continuance of their existing use. Plaintiffs argue that this finding is against the manifest weight of the evidence in that it is an improper consideration that demonstrates the arbitrariness and capriciousness of the Commission's overall conclusions. Plaintiffs argue that the Commission's reference to the "poor stewardship" of ICS shows that the Commission denied the economic hardship exception as a punishment for the neglect of landmark buildings.

This claim may be analyzed by reference to the Commission's rules, which state that in economic hardship cases involving demolition permits, the Commission will consider, among other things, "the testimony of an architect, developer, real-estate consultant, appraiser, or other real-state professional experienced in rehabilitation as to the economic feasibility of rehabilitation or reuse of

the existing structure on the property." Rules and Regulations of the Commission on Chicago Landmarks, Art. V(A)(4)(d). The rules do not further define "economic feasibility" in this context. But assuming *arguendo* the correctness of plaintiffs' assumption that the Commission must take property owners as it finds them, the court again concludes that the Commission did so in this case. The Commission's written decision cited the following evidence of how ICS and its U.S. Section had spent its money in 1988, 1989 and 1990:

Line Time	1988	1989	1990
Salaries	\$365,931	\$318,019	\$350,196
Printing & Publications	151,388	184,694	243,716
Annual Meeting (U.S. Section only)	77,167	151,830	107,781
Repairs & Maintenance	38,722	23,940	40,341

Plaintiffs' Appendix, Exh. 6 at 13; Hardship Hearing Record, Vol. F, Exhs. 602, 603, 702, 703. The following figures show that neglect or poor stewardship by ICS, as reflected in its budget expenditures, is relevant to the "economic feasibility" of rehabilitating the property. The record shows that ICS has spent a relatively small amount of money on repair and maintenance in comparison to its expenditures for other purposes. ICS may wonder whether the Commission ought to be questioning how ICS chooses to spend its money as a private organization. But in doing so, the Commission was doing no more than taking the owner and the property as it finds them, as plaintiff argues the Commission should do. See Plaintiffs' Reply at 54. The evidence in the administrative record supports the Commission's conclusion that continued use of the Blair and Countiss houses as offices and a museum is economically feasible, and the Commission did not err in considering ICS's poor stewardship as a part of that calculus.

3. The Commission's Finding That the Properties Could Be Improved by ICS for a Reasonable Amount of Money Was Not Against the Manifest Weight of the Evidence.

The Commission's finding that the Blair and Countiss houses could be improved for a reasonable amount of money obviously is integral to its conclusion that continuing the current use of the property is feasible. The finding is supported by the evidence the court has already discussed in Part III of this opinion. In finding that the Morgan Report's repair estimate was "inflate[d] . . . to prove a point," the Commission relied on the evidence of the scope of repair and renovation work that was set forth in the report. Plaintiffs' Appendix, Exh. 6 at 15. As the court has observed, the record included evidence that many of the suggested repairs are not needed in order for ICS to continue the existing use of the buildings. See Hardship Hearing Record at 672. Real-state appraiser Jared B. Shlaes, who inspected the property for one of the interested parties, testified: "I saw no evidence of any serious defects anywhere. There were minor defects about which the board has heard a great deal that are correctable at a reasonable cost." *Id.* at 726. Perhaps most telling was the testimony of Walker C. Johnson, an architect retained by ICS to consider the feasibility of ICS's staying in the buildings as they currently exist. Johnson testified that the Morgan Report cost estimates were "very reasonable." *Id.* at 144. But he also testified that the two buildings were "extremely" sound in structure, and that it would be possible to make the buildings watertight for \$480,000.00 and create a maintenance program in which other needed repairs would be made gradually and the costs spread out over a period of years. *Id.* at 162-64. At the same time, the record disclosed no obstacle to financing repair of the buildings through a mortgage, except for the testimony of Lumley of ICS that his organization is simply unwilling to go into debt. *Id.* at 302. The

Commission concluded that the cost of improving the property for continued use was reasonable. On this record, the court cannot say that the opposite conclusion was clearly evident. The Commission's finding therefore was not against the manifest weight of the evidence.

4. Evidence Supports the Commission's Conclusion That Several Feasible Alternative Uses for the Property Were Outlined.

The Commission also found that several feasible alternative uses existed. Specifically, the Commission found that it would be feasible for ICS to sell the Blair House and use the proceeds to consolidate ICS operations into a renovated Countiss House. Plaintiffs' Appendix, Exh. 6 at 15. The Commission found that other feasible alternative uses for either of the buildings would be as consulates or single-family homes. *Id.* at 16-17.

Plaintiffs attack this finding mainly on the basis that each of the suggested alternative uses would force ICS to sell one or both of its buildings. "The forced *sale* of a property cannot possibly be considered a reasonable and feasible alternative *use*," plaintiffs argue. Plaintiffs' Reply at 60. However, plaintiffs' proposed use, which they advance as the only reasonable use, also calls for the sale of the property. Agreed, the proposed redevelopment would allow plaintiffs to stay on the premises, but so would the alternative of selling one of the landmark houses to finance the rehabilitation of the other. In other words, the first of the Commission's suggested alternatives is really no different than the one plaintiffs prefer, except plaintiffs would not reap as much profit as they would like if the buildings were sold as single-family homes for \$6.5 million, as a real-estate appraiser Shlaes testified they could be. Hardship Hearing Record at 726-27.

If both buildings were sold as single-family homes or consulates, ICS would have to move elsewhere. But in that vein, the question becomes whether the economic

hardship exception depends on the property owner's ability to have a particular use it wants, as opposed to another use that is still reasonable. The Landmarks Ordinance provides that economic hardship exceptions are granted "on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830. It does not state that a "reasonable" or "beneficial" use must be one that is suited to the desires of the particular owner. If the buildings still may be used as single-family homes or a consulate despite the denial of the demolition permits, "all reasonable and beneficial use" of the buildings has not been lost. In any event, this is largely an academic question because the court already has concluded that substantial evidence supports the Commission's finding that ICS's continued use of the property in its current state—as offices and a museum—is reasonable.

A word is in order about the evidence in the record supporting the Commission's finding that the aforementioned alternative uses are indeed feasible. As to the sale of one building and consolidation of the other, the Commission noted that ICS acknowledged it needs a total of about 20,000 square feet of space for its operations, whereas the Countiss House offers at least that much space. Lumley of ICS confirmed these facts on cross-examination. Hardship Hearing Record at 302-03. As to the viability of the properties as single-family homes, the Commission received conflicting testimony. *Id.* at 375, 726. But the Commission's written report demonstrates that it believed the witnesses who testified that single-family use was viable or that a market existed for these two buildings as single-family residences. Plaintiffs' Appendix at 16-17. These witnesses included architect Johnson, who testified for ICS. Hardship Hearing Record at 168. The court will not re-evaluate that credibility judgment. With respect to use as a consulate, the Commission heard evidence that the Countiss House is adjacent to the Polish Consulate at

1530 North Lake Shore Drive, and that ICS rejected a \$6.5 million offer in 1986 from the People's Republic of China to buy the Blair and Countiss houses for use as a consulate. *Id.* at 46, 55.¹⁸ Plaintiffs point out that a zoning variance would be required to allow use as a consulate, and they argue that the possibility of obtaining such a variance is purely speculative. Accepting that position for purposes of argument, the court still cannot conclude that the Commission's finding regarding consular use was against the manifest weight of the evidence, given that the Polish Consulate sits right next door to the ICS property.

5. The Commission's Finding That ICS Apparently Ignored or Did Not Fully Explore Potentially Viable Sources of Funds to Allow the Continued Use of the Property Was Not Against the Manifest Weight of the Evidence.

In finding that ICS ignored or did not explore potentially viable sources of funds to allow the continued use of the property, the Commission cited a number of possible sources, including volunteer fund raising, selling one

¹⁸ ICS General Counsel Alvin Edelman gave this testimony. Edelman also testified that the China offer was rejected because the Chinese wanted ICS to "bring the building into full compliance and warrant the condition of the building as being free of any defects of any kind," which was "impossible for us to do." *Id.* at 55, 54. Yet Edelman later testified that in his opinion, the Countiss House—which had been cited for building code violations—was largely in compliance. *Id.* at 72. Viewing the facts in the light most favorable to the agency, the court must conclude that the China offer is substantial evidence of the reasonableness of use of the ICS property as a consulate. Incidentally, the record indicates that the Chinese were serious about their offer. The Chinese, negotiating with Edelman through the law firm of Mayer, Brown & Platt, started with an offer of \$5.5 million and then increased the offer to \$6.5 million. *Id.* at 54-55. But Edelman testified that ICS at that time would accept no less than \$12.7 million. *Id.* at 55.

building and consolidating operations into the other, obtaining private grants, charging a museum admission fee or opening a museum store. Plaintiffs' Appendix, Exh. 6 at 17-19. Plaintiffs argue that all of these options are too speculative to be viable. But as the court concluded above, evidence supported the Commission's finding that using the proceeds of the sale of one of the buildings to finance consolidation into the other would be one viable alternative use. The evidence also supports the finding that ICS has not fully explored this alternative. ICS World President Lumley testified that consolidation would be feasible but unrealistic because it would not accommodate the ICS museum, but at the same time he conceded that "[w]e have got rather luscious accommodations at the moment. We can easily cut down our office space. There are rather large office rooms down there. That could be done." Hardship Hearing Record at 303. The Commission also had a basis in the record to discount Lumley's testimony that consolidation would force the museum out: The Countiss House encompasses more than 20,000 square feet of space, including the coach house but not the basement, and the ICS redevelopment contract with Robin gives ICS the option to retain up to 20,000 square feet of space in the contemplated 41-story high-rise building. *Id.* at 734-35; Plaintiffs' Appendix, Exh. 11 at ¶ 22. Once again the Commission's conclusion regarding consolidation was not against the manifest weight of the evidence.

Moreover, the Commission's written decision also mentioned the possibility of the ICS obtaining the money from its members, citing Lumley's testimony that ICS members are more interested in surgery than in maintaining the buildings. See Hardship Hearing Record at 283; Plaintiffs' Appendix, Exh. 6 at 19. This testimony by Lumley and similar testimony by U.S. Section President Rubio, mentioned earlier in this opinion, support the Commission's finding that ICS has been simply unwilling to

explore effective means of funding its continued use of its buildings. The finding is not against the manifest weight of the evidence.

B. The Commission's Conclusion That Plaintiffs Were Not Deprived of All Reasonable and Beneficial Economic Return From the Property Was Not Against the Manifest Weight of the Evidence.

1. Evidence in the Record Supports the Commission's Finding That the ICS Contract With Robin Is a Single But Not Controlling Factor in Determining Whether ICS Was Entitled to an Economic Hardship Exception.

Plaintiffs argue that in finding that the ICS contract with Robin to redevelop the Blair and Countiss houses was not the controlling factor in the ICS application for an economic hardship exception, the Commission "does what any child would do under the circumstances" by denying that the contract is real through the "euphemism" of describing the contract as "not a controlling factor." Plaintiffs' Memorandum at 126. However, as defendants point out, the Commission's rules specifically provide that economic hardship is not established solely by proof of an actual loss or a lost opportunity to gain increased return from the property. Rules and Regulations of the Commission on Chicago Landmarks, Art. V(C). In addition, plaintiffs' argument that the contract is the controlling factor ignores the fact that the contract is void unless the city grants the permits necessary to allow the redevelopment to go forward. Hardship Hearing Record at 37. Therefore the Commission properly considered the property's appraised value as landmark single-family homes, in addition to its value under the ICS contract for a purported \$17 million sale to Robin. That appraised value

was \$6.5 million, *id.* at 727, and it is substantial evidence supporting the Commission's decision that a reasonable economic return was possible through the sale of the buildings.

The Commission's consideration of the ICS contract as only a single factor also is supported by Shlaes' testimony that in his opinion, the soft market for high-rise condominium units would not support the cost of redeveloping the ICS property as a high-rise. *Id.* at 731, 810. This testimony is significant because although the redevelopment contract provides for a purchase price of \$17 million, only about \$12.5 million would be paid up front. Plaintiffs' Appendix, Exh. 11 at ¶ 4. The remainder would be secured by the buyers' execution of a nonrecourse promissory note; the buyers would pay off the note by conveying 50 percent of the proceeds from the sale of the condominium units until the balance is paid in full. *Id.* So if the units did not sell, ICS would not receive the full \$17 million.

The Commission's consideration of the contract as only one factor was not against the manifest weight of the evidence.

2. The Commission's Finding That the Contract Does Not Establish a Value for the Properties Was Not Against the Manifest Weight of the Evidence.

Plaintiffs argue that because the ICS contract with Robin was "in full force and effect" and was "valid and enforceable," the Commission erred when it found that the contract itself does not establish a value for the properties. As explained above, the contract's value of \$17 million was contingent on successful sale of the condominium units. The Commission relied on that fact in making its finding. Plaintiffs' Appendix, Exh. 6 at 22. The Commission also observed that the contract is not

an appraisal, and that ICS did not submit its own appraisal as to the value of the Blair and Countiss houses. *Id.* at 21-22. The only real appraisal before the Commission was the \$6.5 million appraisal prepared for the interested parties by Shlaes, as the Commission noted, adding that the appraisal's reasonableness was supported by the uncontroverted evidence that the Chinese government offered the same amount for the property in 1986. *Id.* at 22-23. In light of the Shlaes appraisal and Shlaes' testimony that the Robin contract was highly speculative under current market conditions, plaintiffs have not established that the Commission went against the manifest weight of the evidence when it found that the contract did not establish the value of the property.

3. The Commission Did Not Err in Concluding That It Was Required to Determine Whether The Permit Denials Caused a Loss of All Reasonable Return, as Opposed to the Highest and Best Return.

The Commission's written findings included the conclusion that it need only determine whether ICS was deprived of all reasonable return, as opposed to the highest and best return. The Commission supported this conclusion with a discussion of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Commission stated:

Penn Central seems to set a permissibly high standard in determining whether a landmark designation constitutes a governmental "taking" of property. The Applicant would have the Commission believe that a "taking" occurs whenever a designation prevents a landowner from developing a property to its "highest and best use." This proposition is inconsistent with the Commission's understanding of the letter and spirit of *Penn Central* and subsequent court decisions. In the context of a landmark designation,

denying an applicant the highest and best use of a property is not a denial of all reasonable and beneficial use or return. In fact, according to *Penn Central*, a designation that does not prevent the applicant from the continued use [of] the property does not amount to either a taking or an economic hardship.

Plaintiffs' Appendix, Exh. 6 at 24.

Although review of agency findings of fact is deferential, the court independently reviews the correctness of agency conclusions of law. *Board of Educ. of Schaumburg Community Consol. School Dist. 54 v. Illinois Educ. Labor Relations Bd.*, 247 Ill. App.3d 439, 616 N.E.2d 1281, 1291 (1st Dist.), *appeal denied*, 152 Ill.2d 554, 622 N.E.2d 1200 (1993). In *Penn Central*, the United States Supreme Court held that New York City's landmarks ordinance did not effect a "taking" of a landmark owner's property because the restrictions promoted the public interest in preserving historic buildings while permitting "reasonable beneficial use of the landmark site" and a "reasonable return on [the owner's] investment." *Penn Central*, 438 U.S. at 136, 138 (internal quotation marks omitted).

Plaintiff argues that the Commission wrongly applied *Penn Central* to this case because the Blair and Countiss houses "cannot continue to be used without the expenditure of substantial amounts of money," which ICS does not have. Plaintiffs' Memorandum at 130. But as the court has pointed out several times in this opinion, there is evidence in the record that the shortage of funds for the maintenance or rehabilitation of the building is not a result of landmark designation, but instead is a matter of conscious choice by ICS as to how to allocate its financial resources. The court's January 1992 opinion saw no meaningful distinction between *Penn Central* and this case, and nor does such a distinction exist today. The Commission did not err in relying on the rationale of

Penn Central in reaching the result it did. Even if the Commission's rules do not call for economic hardship exceptions to be considered in terms of the legal issues that arise in a takings context, there is nothing to prevent the Commission from drawing upon the common law of takings as a part of its thoughtful consideration of whether the landmark designation and permit review process is treating the landowner with fundamental fairness.

The Commission did not commit any error of law when it relied on *Penn Central* to conclude that it need only determine whether the permit denial deprived plaintiffs of all reasonable return, as opposed to the highest and best return.

4. The Commission's Finding That Other Alternatives Were Demonstrated for the Reasonable Economic Return on the ICS Property Was Not Against the Manifest Weight of the Evidence.

This finding by the Commission regarding alternative means of a reasonable economic return on the ICS property is largely cumulative of the agency's finding that several reasonable and feasible alternatives had been shown for the use of the property. The Commission stated that a sale of either of the buildings for the amounts estimated in the Shlaes appraisal (\$3.1 million for the Blair House and \$3.4 million for the Countiss House) "would represent a reasonable return" in ICS's initial investment. Plaintiffs' Appendix, Exh. 6 at 25. Noting that the record showed the Commission bought the Blair House for \$85,000.00 in 1947 and the Countiss House for \$185,000.00 in 1950, the Commission accepted Shlaes' testimony that if the property were sold, the Blair House would fetch at least an 8.52 percent compound annual net return, and that the Countiss House would earn at least a 7.36 percent return. *Id.* at 25-26. These calcula-

tions of economic return did not account for the fact that ICS had occupied the buildings for more than 40 years without paying rent, and that the buildings had rental value, according to Shlaes. *Id.*

The Commission's decision simply quoted Shlaes' testimony, and plaintiffs do not dispute such that testimony was in the record. Rather, the plaintiffs ask this court to reweigh that testimony against statements by ICS witnesses to the effect that without the redevelopment, the property cannot be sold for more than \$700,000.00, yielding an unreasonable return. Again, the court cannot reweigh the evidence or re-evaluate the credibility of the witnesses. The agency's conclusion based on Shlaes' testimony was not against the manifest weight of the evidence and will not be disturbed.

The Commission's finding also included a discussion of the possible sale or lease of one building and consolidation of ICS operations into the other. But this discussion, along with the Commission's extrapolation of the \$6.5 million offer from the Chinese government by use of the Consumer Price Index, do not significantly add to the Commission's conclusion that ICS could gain a reasonable return through the sale of the buildings at the appraised value. Therefore these aspects of the Commission findings do not require further discussion.

5. The Record Included Evidence to Support the Commission's Finding That ICS Knew of the Commission's Consideration and the Eventual Adoption of the Designation Ordinance.

The Commission found that when ICS negotiated the redevelopment contract with Robin, it did so with full knowledge of the possibility that the property would be designated as a landmark. This finding is not against the manifest weight of the evidence. Plaintiffs argue that the

finding is arbitrary because it ignores how ICS had planned to redevelop its property in some manner as early as 1966, well before the city began considering landmark designation in June 1988. Plaintiffs' Memorandum at 133-34. But evidence in the record showed that plaintiffs' earlier redevelopment plans (those other than the current proposal) failed not because of any action by the city, but because the financial details did not fall into place.¹⁴ Hardship Hearing Record at 74. So there is no evidence to support plaintiffs' suggestion that landmark designation in any way thwarted plaintiffs' earlier expectations.

As to their current expectations, this court already has concluded that plaintiffs received adequate notice of the designation proceedings on June 1, 1988. Plaintiffs have stated that contract negotiations actually began several months earlier, in January 1988, but the contract was signed in February 1989 (four months before the City Council formally designated the property as landmarks) and ratified by ICS's governing board in October 1989 (four months after designation). *See id.* at 32-34. But plaintiffs do not seriously argue that they conducted the contract negotiations without knowledge of the possibility of landmark designation and the regulations that would go along with it. They could not make that argument,

¹⁴ Specifically, a development plan involving architect Karl Metz fell apart in 1968 because ICS balked at lending institutions' demands for an equity partnership in the project as a premium for their making the loans. *Id.* at 39-43. In 1972, the National Restaurant Association offered to sell its property at 1530 North Lake Shore Drive, immediately north of the Countiss House, to ICS for \$770,000.00 "based upon a plan to develop all three buildings," but ICS lacked the funds for the purchase, and the 1530 building was sold to the government of Poland for use as a consulate. *Id.* at 43-46. ICS later received a \$4.5 million offer from Jupiter Corporation in 1980 to redevelop the ICS property into a 40-story condominium tower, but Jupiter backed out, citing high interest rates. *Id.* at 46. ICS rejected subsequent offers from the Hawthorne Development Group in 1980, the 1516 Associates Partnership in 1982, and the Chinese government in 1986. *Id.* at 48-51, 53-55.

since the contract language itself anticipates legal costs to oppose landmark status. Plaintiffs' Appendix, Exh. 11 at ¶ 16. This contractual language is perhaps the clearest evidence in support of the Commission's finding that insofar as ICS was claiming an economic hardship related to landmark designation, ICS could not claim that its attempts to redevelop its property were blindsided by the designation.

CONCLUSION

For the foregoing reasons, the court will enter summary judgment in favor of defendants and against plaintiffs on plaintiffs' claims for alleged violations of state and federal equal protection and due process; of state constitutional prohibitions against special legislation, unlawful delegation, vagueness and the uncompensated taking or damaging of property; and of any vested rights under state law. The court will also affirm the Commission's decisions denying plaintiffs' applications for demolition permits and an economic hardship exception.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

December 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

No. 91 C 5564

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

JUDGMENT ORDER

Final judgment is hereby entered on the plaintiffs' First Amended Consolidated Complaint for Administrative Review, as follows:

1. Summary judgment is entered in favor of the defendants and against the plaintiffs on the plaintiffs' claims for alleged violations of federal and state equal protection and due process; of state constitutional prohibitions

against unlawful delegation, special legislation, vagueness and the uncompensated taking or damaging of property; and of any vested rights under state law.

2. Judgment is entered in favor of defendants and against plaintiffs, affirming the decisions of the Commission on Chicago Landmarks denying plaintiffs' applications for demolition permits and an economic hardship exception regarding the property at 1516 and 1524 North Lake Shore Drive.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX C

December 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 7849

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

ORDER

On March 30, 1993, this court stayed this action pending the resolution of the proceedings in 91 C 1587 and 91 C 5564, related matters that have been consolidated ("the consolidated action"). The consolidated action concerns a complaint for administrative review of decisions by the Commission on Chicago Landmarks, under the authority vested in it by the Chicago Landmarks Ordinance, with respect to plaintiffs' plans to develop their property. This action seeks administrative review of the Chicago Plan Commission's denial of plaintiffs' application for approval of the same proposed development under the Chicago and Lake Michigan Lakefront Protection Ordinance.

In moving to stay this action, plaintiffs conceded that if this court, in the consolidated action, should decide that the Landmarks Commission's actions were lawful, plain-

tiffs would be unable to proceed with their proposed development regardless of whether the Chicago Plan Commission acted properly in its application of the Lakefront Protection Ordinance. Plaintiffs' Motion to Stay at ¶ 4. Plaintiffs added that if they did not prevail in the consolidated action, and if this court's unfavorable decision in that action is affirmed on appeal, plaintiffs would voluntarily dismiss this action. *Id.*

On this date the court is entering judgment for defendants in the consolidated action, for the reasons stated in the court's memorandum opinion. With plaintiffs having conceded that an unfavorable decision in the consolidated action renders this action moot, the court hereby dismisses this action with prejudice but with leave to reinstate in the event the court's decision in the consolidated action is vacated, reversed or remanded on appeal.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX D

August 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

 No. 91 C 1587

 INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

 CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs International College of Surgeons and Robin Construction Corporation filed a complaint for administrative review of an adverse decision of the Chicago Landmarks Commission in the Circuit Court of Cook County. Defendant City of Chicago ("the City") removed the case to this court pursuant to 28 U.S.C. § 1441(b). Plaintiffs now seek to remand the case on the grounds removal was improper and the removal petition was procedurally defective. For the reasons stated below, plaintiffs' motion to remand is denied.

Plaintiffs' complaint raises several federal constitutional issues over which this court has original jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs allege that the landmark ordinance, both on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment and constitutes an unlawful taking in

violation of the Fifth and Fourteenth Amendments. Plaintiffs' Complaint for Administrative Review ("Plaintiffs' Complaint"), ¶¶ 16(a), 16(d), 16(e)-(h), 16(j), 16(k), 16(n). Moreover, plaintiffs seek a declaration that the landmark ordinance is unconstitutional on its face and as applied and a declaration that the Landmarks Commission violated plaintiffs' right to due process and equal protection by denying their application for a demolition permit. Plaintiffs' Complaint at 23, ¶¶ 2-5. Where the court has original jurisdiction "founded on a claim or right arising under the Constitution . . . of the United States," the action is removable pursuant to 28 U.S.C. § 1441(b).¹

In their reply memorandum, plaintiffs raise for the first time the possibility of a procedural defect in the removal petition. Plaintiffs observe, almost in passing, that defendant 1500 Lake Shore Drive Building Corporation ("1500 Lake Shore") had not communicated its consent to removal within thirty days of its receipt of the initial pleading containing the removable claim, as required by 28 U.S.C. § 1446(b). Plaintiffs state merely that 1500 Lake Shore "had yet to indicate to this Court [its] position with respect [to removal]," and cryptically note that "it is not entirely clear whether such inaction . . . presents a problem in this instance." Plaintiffs' Reply Memorandum in Support of Their Motion to Remand ("Plaintiffs' Reply"), at 2, note 1. Defendant 1500 Lake Shore then filed a surreply in which it vigorously denies plaintiffs' assertions that it failed to consent to removal, and plaintiffs in turn have filed a reply to 1500 Lake Shore's surreply, in which they discuss the alleged procedural defect in greater depth.

¹ Plaintiffs alternatively contend that the court should decline to exercise its jurisdiction in this case pursuant to various abstention doctrines. However, the issue of whether removal was proper is distinct from the issue of whether abstention would be appropriate. The court declines to address the merits of abstention at this early juncture.

Plaintiffs' complaint for administrative review was filed in state court on February 13, 1991. The notice of removal filed by the City on March 15, 1991, explicitly states: "The other defendants in this proceeding, 1500 Lake Shore Drive Building Corporation and the North State, Astor, Lake Shore Drive Association have consented to the removal of this suit to federal court." Notice of Removal, ¶ 4. On the same day, 1500 Lake Shore filed its appearance in federal court.

Nonetheless, in their reply to 1500 Lake Shore's sur-reply, plaintiffs allege that the removal petition is defective because all defendants did not sign the removal notice "or otherwise formally express their unanimous consent to the court within the thirty-day period." The court disagrees. The case law does not require that each defendant sign the removal notice, *see Fellhauer v. City of Geneva*, 673 F. Supp. 1445, 1447 (N.D. Ill. 1987), and paragraph 4 of the notice of removal, which names the additional defendants and states that all have consented to removal, is sufficient to convey the defendants' unanimous consent.²

CONCLUSION

Plaintiffs' motion to remand is denied.

DATED: August 27, 1991

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

² Indeed, plaintiffs themselves previously acknowledged that "[o]n March 15, 1991, all of the other defendants joined in a Notice of Removal removing this civil case from the Circuit Court of Cook County." Plaintiff's Memorandum in Support of Motion to Remand at 2. Plaintiffs' earlier admission might estop them to contest the issue of unanimous consent. *See Fellhauer*, 673 F. Supp. at 1447 ("The thirty-day requirement is not a jurisdictional limitation, and therefore a plaintiff may waive or be estopped from asserting this objection.").

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT Chicago, Illinois 60604

November 4, 1996

Before HON. WILLIAM J. BAUER, Circuit Judge
HON. KENNETH F. RIPLE, Circuit Judge
HON. WALTER JAY SKINNER, District Judge*

Nos. 95-1293 and 95-1315

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its Commissioners, REUBEN L. HEDLUND, *et al.*,
Defendants-Appellees.

* The Honorable Walter Jay Skinner of the United States District Court for the District of Massachusetts is sitting by designation.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern District
No. 91 C 1587, No. 91 C 5564, No. 91 C 7849,
John F. Grady, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc initially filed on September 5, 1996 and the petition with corrected appendix refiled on September 19, 1996, by defendants-appellees, no judge** in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

** The Honorable Joel M. Flaum did not participate in the consideration of this case.